No. 15-5040

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 12, 2015
CERTIORARI GRANTED OCTOBER 1, 2015

262108

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APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE SUPREME COURT OF PENNSYLVANIA CRIMINAL CASE #: 163 EM 2012

DOCKET ENTRY

Filed Date	Docket Entry/ Representing	Participant Type	Filed by
10/01/2012	**Supplement to Petition**	Petitioner	Commonwealth of Pennsylvania
10/01/2012	**Response in Opposition to Motion to Vacate Stay of Execution**	Respondent	Williams, Terrance
10/01/2012	**Motion to Recuse Chief Justice Castille**	Respondent	Williams, Terrance
10/01/2012	**Answer to Recusal Motion**	Petitioner	Commonwealth of Pennsylvania
	* * *		
09/28/2012	**Emergency Application Under Pa. R.A.P. 1702(d) and 3316 to Review Order Staying Execution**	Petitioner	Commonwealth of Pennsylvania
	* * * *		

Appendix A

RELEVANT DOCKET ENTRIES FROM THE SUPREME COURT OF PENNSYLVANIA CAPITAL CASE #: 668 CAP

SUPREME COURT INFORMATION

Appeal From: the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at No. CP-51-CR-0823621-1984, granting a Stay of Execution

Appeal Filed Below:

Docketed Date: October 4, 2012

* * *

REARGUMENT/RECONSIDERATION/REMITTAL

Filed Date: December 29, 2014

Disposition: Order Denying Application for Reargument

Date: February 18, 2015

Reargument Order: AND NOW, this 18th day of February, 2015, appellee's Application for Reargument is DENIED.

Record Remittal:

* * *

Appendix A

DISPOSITION INFORMATION

Related Journal No: J-82A-2013

Judgment Date: December 15, 2014

Category: Decided

Disposition Author: Governor

Disposition: Vacated

Disposition Date: December 15, 2014

Dispositional Filing: **Majority Opinion**

Author: Eakin, J. Michael

Filed Date: December 15, 2014

Justice: Castille, Ronald D.
Vote: Join Majority Opinion

Justice: Baer, Max
Vote: Join Majority Opinion

Justice: Todd, Debra
Vote: Concurs in the Result

Dispositional Filing: **Concurring Opinion**

Author:

Filed Date: December 15, 2014

Appendix A

DOCKET ENTRY

Filed Date	Docket Entry/ Representing	Participant Type	Filed by
9/28/2012	**Emergency Application Under Pa. R.A.P. 1702(d) and 3316 to Review Order Staying Execution**	Appellant	Commonwealth of Pennsylvania
Comments: Transferred from 163 EM 2012			
10/01/2012	**Response in Opposition to Motion to Vacate Stay of Execution**	Appellee	Williams, Terrance
Comments: Transferred from 163 EM 2012			
10/03/2012	**Case Transferred pursuant to Order entered on 10/03/2012 at No. 163 EM 2012**		Per Curiam
10/04/2012	**Case was transferred from 163 EM 2012**		Office of the Prothonotary

* * *

Appendix A

12/15/2014	**Order Vacated, petition dismissed; judgment of sentence reinstated**		Governor

Comments:
Order vacated; petition dismissed; judgment of sentence reinstated.
Jurisdiction relinquished.
Mr. Chief Justice Castille and Messrs. Justice Baer and Stevens join the opinion.
Mr. Chief Justice Castille files a concurring opinion.
Mr. Justice Saylor and Madame Justice Todd concur in the result

12/15/2014	**Judgment Entered**		Office of the Prothonotary
12/29/2014	**Application for Reargument**	Appellee	Williams, Terrance
1/07/2015	**No Answer Letter to Application for Reargument** Commonwealth of Pennsylvania	Appellant	Carr, Peter
1/13/2015	**Warrant of Execution Filed**		Governor
2/13/2015	**Temporary Reprieve of Execution**		Governor

Appendix A

2/18/2015	**Order Denying Application for Reargument**	Per Curiam

Comments:
AND NOW, this 18th day of February, 2015, appellee's Application for Reargument is DENIED.

* * * *

APPENDIX B — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, DENYING REARGUMENT, DATED FEBRUARY 18, 2015

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 668 CAP

Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at No. CP-51-CR-0823621-1984, granting a Stay of Execution

SUBMITTED: September 18, 2013

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

TERRANCE WILLIAMS,

Appellee.

No. 669 CAP

Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at No. CP-51-CR-0823621-1984

SUBMITTED: September 18, 2013

Appendix B

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

TERRANCE L. WILLIAMS,

Appellee.

ORDER

PER CURIAM

AND NOW, this 18th day of February, 2015, appellee's Application for Reargument is **DENIED**.

APPENDIX C — APPELLEE'S APPLICATION FOR REARGUMENT IN THE SUPREME COURT OF PENNSYLVANIA, DATED DECEMBER 29, 2014

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NOS. 668 & 669 CAPITAL APPEAL DOCKET

COMMONWEALTH OF PENNSYLVANIA,

Appellant/Cross-Appellee,

v.

TERRANCE WILLIAMS,

Appellee/Cross-Appellant.

Dated: December 29, 2014

APPELLEE'S APPLICATION FOR REARGUMENT

[TABLES INTENTIONALLY OMITTED]

ORDER IN QUESTION

Appellant, Terrance Williams, respectfully submits that reargument is appropriate with regard to the decision of this Court rendered on December 15, 2014, reversing the PCRA court's grant of post-conviction relief in this capital case. *Commonwealth v. Williams*, __ A.3d __ (Pa. 2014) (slip opinion attached as Exhibit A).

Appendix C

ARGUMENT

The Court in this case reversed a ruling by the PCRA court below that the prosecution violated Mr. Williams's due process rights pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, the PCRA court ruled that the prosecution improperly withheld three pieces of evidence that each supported the proposition that the decedent, Amos Norwood, had been sexually abusing Mr. Williams from the time Mr. Williams was a young teenager, and had also abused other young boys. Exhibit A at 5-6 (describing how prosecution withheld information from Mr. Norwood's wife, Mr. Norwood's pastor, and the trial prosecutor's own notes that revealed Mr. Norwood's predatory nature). The PCRA court further ruled that Mr. Williams's claim, raised in a successor PCRA petition, was timely filed insofar as it met the governmental interference exception to the PCRA's timeliness requirement. *Id.* at 4; *see also* 42 Pa. C.S. § 9545(b)(1)(i).

This Court reversed, ruling that Mr. Williams's PCRA petition did not meet the governmental interference exception to the timeliness requirement and that Mr. Williams's *Brady* claim lacked merit. Exhibit A at 11-17. In making these rulings, the Court placed heavy reliance on the fact that "appellee knew of Norwood's homosexuality and conduct with teenage boys well before trial, sufficient to present him as unsympathetic before the jury." *Id.* at 11; *see also id.* at 12 ("Appellee's prior knowledge was also evident at his federal habeas corpus proceeding, during which he alleged Norwood was a closeted homosexual from whom he could extort cash by threatening to expose

Norwood's secret to his wife"); *id.* at 13 ("The evidence alleged to comprise the *Brady* violation does not include information unknown to appellee"); *id.* at 14 ("The pastor's suggestion that he suspected Norwood may have been a homosexual would hardly have surprised appellee, who knew that for years").

This Court's ruling that a criminal defendant's knowledge of a particular fact defeats a *Brady* claim where the prosecution withholds evidence supporting that same fact is contrary to United States Supreme Court law. A *Brady* violation is established where favorable evidence was suppressed by the government, either intentionally or inadvertently, and the suppressed evidence was material. *Simmons v. Beard*, 590 F.3d 223, 233-34 (3d Cir. 2009). The test for materiality is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 234.

A prosecutor is not absolved from withholding exculpatory information from a criminal defendant merely because the defendant has some knowledge of the information withheld. One need look no further than *Brady* itself to establish that this Court should revisit its ruling in this case. In *Brady*, the Court granted sentencing relief in a capital case where the prosecution withheld evidence that Brady's codefendant was the triggerman. *Brady*, 373 U.S. at 84, 86. This fact was necessarily known to Brady himself, but at no point did the Court rule that the claim failed as a result of Brady's personal knowledge.

Likewise, in *Cone v. Bell*, 556 U.S. 449 (2009), the United States Supreme Court granted relief in a capital case where the prosecution withheld evidence that "strengthen[ed] the inference that Cone was impaired by his use of drugs around the time his crimes were committed." *Id.* at 470. Cone was sentenced to death for a crime spree in which he robbed a jewelry store and a drug store; shot a police officer and a bystander; attempted to hijack a car and shoot the driver; attempted to shoot a police helicopter; attempted to forcibly enter an elderly woman's house at gunpoint; and broke into the home of an elderly couple, "beat the couple to death with a blunt instrument and ransacked ... their home." *Id.* at 452. At his trial, Cone presented testimony from two expert witnesses about the effects of his drug use at the time of the offense. The government "discredit[ed] Cone's claims of drug use" by showing "that both defense experts' opinions were based solely on Cone's representations" to the experts. *Id.* at 454-55. The Court ruled that the suppressed evidence suggested that "drug use played a mitigating, though not exculpating, role in the crimes [Cone] committed" and that it "may have persuaded the jury that Cone ha[d] a far more serious drug problem than the prosecution was prepared to acknowledge." *Id.* at 475.

Much as Brady knew that he was not the triggerman, Cone knew that he was high on drugs at the time of his crime spree. Nowhere in either opinion did the Court suggest that a defendant's personal knowledge of a particular fact gives the prosecution free reign to withhold all exculpatory evidence corroborating that fact. Were that the law, a prosecutor would never be under any duty

to disclose information supporting a self-defense, mere presence, or a claim of alibi. In every case, a defendant would necessarily know that he acted in self-defense, was merely present, or was not present at all. The due process violations in *Brady* and *Cone* lay in the non-disclosure of information from witnesses other than the defendants themselves.

In short, Mr. Williams's knowledge that he was sexually abused by Mr. Norwood did not relieve the Commonwealth of its duty under the Due Process Clause to disclose evidence corroborating this abusiveness. Nor did it give the prosecutor the right to deliberately mislead the jury about information in its possession. This Court's ruling that Mr. Williams should have earlier uncovered what the Commonwealth suppressed sanctions a procedure by which the "prosecutor may hide, [and] defendant must seek"; such a procedure "is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

For the same reason that Mr. Williams has set forth a meritorious *Brady* claim, he satisfies the governmental interference exception to the PCRA's timeliness requirement. *See* Exhibit A at 8 (stating that "a *Brady* violation might fall within the 'governmental interference' exception" where a PCRA petitioner establishes "(1) the failure to previously raise the claim was the result of interference by government officials and (2) the information on which he relies could not have been obtained earlier with the exercise of due diligence"). Because the timeliness and substantive *Brady* rulings

made by the Court each rest upon the incorrect premise that Mr. Williams's personal knowledge can serve to defeat a claim that the prosecution improperly withheld exculpatory evidence, the Court should grant reargument and affirm the ruling of the PCRA court.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellant Terrance Williams respectfully requests that the Court grant this application for reargument, vacate Mr. Williams's death sentence, and remand this matter to the Philadelphia Court of Common Pleas for a new sentencing hearing.

Respectfully submitted,

/s/_____

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APPENDIX D — OPINION OF THE SUPREME COURT OF PENNSYLVANIA, REVERSING THE GRANT OF PENALTY-PHASE RELIEF, DATED DECEMBER 15, 2014

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 668 CAP

Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at No. CP-51-CR-0823621-1984, granting a Stay of Execution

SUBMITTED: September 18, 2013

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

TERRANCE WILLIAMS,

Appellee.

No. 669 CAP

Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at No. CP-51-CR-0823621-1984

SUBMITTED: September 18, 2013

Appendix D

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

TERRANCE L. WILLIAMS,

Appellee.

OPINION

DECIDED: December 15, 2014

MR. JUSTICE EAKIN

The Commonwealth appeals from the order granting a stay of execution, vacating appellee's death sentence, and awarding a new penalty hearing under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We vacate the stay of execution and the grant of a new penalty phase, and reinstate the sentence of death.

Appellee was sentenced to death after being convicted of the robbery and murder of Amos Norwood February 3, 1986, his second murder conviction. A detailed account of the crime is set forth in our opinion on direct appeal. *See Commonwealth v. Williams*, 524 Pa. 218, 570 A.2d 75, 77-79 (Pa. 1990). Suffice it to say, appellee and his co-conspirator, Marc Draper, took Norwood to a graveyard, tied him with his own clothes, and beat him to death with a tire iron — appellee returned the next day and set fire

to the corpse. At trial, appellee testified that Draper and another individual committed the crime; he claimed he was elsewhere at the time and uninvolved. He testified he did not know the victim, had never seen him before, and had no reason to be angry with him or wish to harm him. This Court affirmed the judgment of sentence February 8, 1990, *id.*, at 84, and appellee did not seek certiorari. He filed a timely PCRA petition March 24, 1995.

At the 1998 PCRA hearing, now represented by the Federal Community Defenders Office (FCDO), appellee abandoned his trial testimony and argued Norwood engaged in homosexual acts with him, and as set forth below, presented evidence supporting this claim. The PCRA court denied relief, and this Court affirmed. *Commonwealth v. Williams*, 581 Pa. 57, 863 A.2d 505, 523 (Pa. 2004). Appellee filed a second PCRA petition February 18, 2005, which was dismissed as untimely. This Court affirmed. *Commonwealth v. Williams*, 589 Pa. 355, 909 A.2d 297 (Pa. 2006) (*per curiam*). Appellee filed a third PCRA petition June 1, 2005, which was dismissed as untimely, and we affirmed. *Commonwealth v. Williams*, 599 Pa. 495, 962 A.2d 609 (Pa. 2009) (*per curiam*).

While that PCRA appeal was pending before this Court, appellee filed a federal *habeas corpus* petition December 19, 2005, which was denied. The Third Circuit affirmed. *Williams v. Beard*, 637 F.3d 195, 238 (3d Cir. 2011). In his federal appeal, appellee contended trial counsel was ineffective for failing to present evidence he was psychologically damaged by years of sexual abuse, which infused him with rage toward men who made sexual

advances toward him; appellee argued Norwood was one of these men and had been sexually abusing him since the age of 13. Appellee petitioned the United States Supreme Court for certiorari, which was denied. *Williams v. Wetzel*, 133 S. Ct. 65, 183 L. Ed. 2d 711 (2012) (*per curiam*).

On January 9, 2012, the FCDO visited Draper, who was serving a life sentence at SCI-Frackville. That same day, Draper signed an affidavit declaring he told detectives and the prosecution prior to trial that Norwood was a homosexual and was in a relationship with appellee. The affidavit also claimed the prosecution "wanted the motive to be a robbery and kept coming back to that. That's how they wanted me to testify, that it was a robbery." Draper's Affidavit, 1/9/12, at 4. The FCDO revisited Draper March 1, 2012, obtaining another affidavit with similar declarations.

Appellee then filed this facially untimely PCRA petition March 9, 2012, his fourth state petition for collateral review. On July 27, 2012, he filed a "Supplemental Petition for Post Conviction Relief and Notice of Filing Additional Evidence in Support of Stay of Execution," although no execution warrant had been signed. An execution warrant was subsequently issued August 8, 2012, setting the execution for October 3, 2012. Appellee filed a "Renewed Motion for Stay of Execution" August 28, 2012, and the Commonwealth filed a response September 7, 2012. On September 6, 2012, appellee filed a motion for discovery, requesting the production of exculpatory information from the Commonwealth "as well as any reports or notes made concerning Norwood's sexual relationship or sexual

abuse of [appellee] or any other child under the age of 18." Appellee's Motion for Discovery, 9/6/12, at 5-6.

On September 10, 2012, the PCRA court heard argument on the pleadings to determine whether the petition warranted an evidentiary hearing. The court gave appellee time to obtain and submit additional information from Draper, which led to his third affidavit, dated September 11, 2012. On September 14, the court heard additional argument and ordered an evidentiary hearing, which began September 20; only Draper and the trial prosecutor testified. On Saturday, September 22, the court ordered the Commonwealth to produce trial files and Philadelphia Police Department files and allowed both parties to review those files.[1] On September 24, documents from these files were offered and admitted into evidence, and the PCRA court entered 11 exhibits *sua sponte*. *See* Exhibit List, 9/20/12. The court then directed appellee to amend his PCRA petition; on September 28, appellee filed an "Amendment and Supplement to Petition for Post-Conviction Relief," requesting relief because the Commonwealth had given "sanitized" witness statements to the defense. The same afternoon, the court ruled there

1. The court's order included files for both the Norwood murder and the murder of Herbert Hamilton. Both murders had the same trial prosecutor, the same defendant (appellee), and the same key witness (Draper). In the Hamilton murder, appellee was receiving money from Hamilton in exchange for sex; appellee murdered Hamilton when he threatened to expose this relationship. Although the charge was first degree murder, the jury convicted appellee of third degree murder, about one year before the Norwood trial.

was a *Brady*[2] violation because that which was missing from original discovery suggested Norwood may have been a "homosexual ephebophiliac." PCRA Court Opinion, 11/27/12, at 12-13 (citations omitted).[3]

The PCRA court also concluded appellee's fourth PCRA petition met the "governmental interference" exception to the PCRA's timeliness requirement, 42 Pa.C.S. § 9545(b)(1)(i),[4] though it did not meet the "newly-discovered evidence" exception, *id.*, § 9545(b)(1)(ii).[5] The court ordered a stay of execution pursuant to § 9545(c)(2),[6] finding appellee exceeded the "strong

---

2. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

3. The PCRA court defined "homosexual ephebophilia" as a psychological term for the attraction to "young men," both adults and adolescents. *See id.*, at 13 n.32.

4. Subsection (b)(1)(i) provides an untimely PCRA petition falls within an exception if the petitioner proves: "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States[.]" *Id.*

5. Subsection (b)(1)(ii) provides an exception for an untimely PCRA petition if the petitioner proves: "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence[.]" *Id.*

6. Subsection (c)(2) states no stay may be issued unless a PCRA petition meeting all requirements of this subchapter of the PCRA has been filed and is pending, and the petitioner makes "a strong showing of likelihood of success on the merits." *Id.*, § 9545(c)(2).

likelihood" threshold and demonstrated actual success on the merits of his claim regarding the penalty phase. The court held the Commonwealth violated *Brady* and found appellee identified a specific claim, Norwood's homosexual ephebophilia, which he was unable to discover or develop due to interference by the Commonwealth. The interference consisted of withholding or "sanitizing" three specific pieces of evidence: a statement by Norwood's wife, a statement by the pastor of appellee's church, and notes made by the prosecutor.

The first statement involved a story Norwood's wife told police, which was omitted from the 1984 police activity sheet. She said Norwood once woke her at 2 a.m. and asked her for money while a young male stood in the hall outside their bedroom. She saw Norwood load stereo equipment into his car and drive away with the young male. She told police she believed this to be a kidnapping; when Norwood returned home around 9 a.m., he said he was abducted but escaped by using psychology on his captors. When his wife tried to call the police, Norwood asked her to avoid their involvement.

The second statement was from appellee's pastor, who was also a friend of Norwood. The pastor told police Norwood worked with and counseled young males in the church for many years. Omitted from the 1984 activity sheet was the pastor's suspicion that Norwood may have been a homosexual, and that five years earlier, the pastor received a complaint from a mother alleging Norwood propositioned her 17-year-old son for sex. The pastor also repeated for police the "kidnapping" story told by

Norwood's wife — this was included with the pastor's statements in the 1984 police activity sheet, which had been disclosed to the defense.

The court also found the Commonwealth failed to disclose handwritten notes by the trial prosecutor, purportedly recounting an instance of Norwood's behavior toward a teenage male, which would establish the prosecution's awareness of Norwood's homosexual proclivities. The court stated, had such evidence been disclosed to the defense, trial counsel would have been able to challenge the Commonwealth's sympathetic portrayal of Norwood. The court concluded the inability to portray an unsympathetic victim was enough to undermine one's confidence the jury would have returned the same verdict of death.[7]

Finding appellee exercised due diligence, the court concluded he did not know this evidence existed until his co-conspirator executed an affidavit in January, 2012, declaring a possible motive for the crime, *i.e.*, rage over

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7. The court also stated the Commonwealth interfered with appellee's *Brady* claim by "disput[ing] the existence of information in [its] files about [] Norwood's homosexual ephebophilia" when the Commonwealth represented to the 1998 PCRA court that the only evidence involved in the case was appellee's knowledge that Norwood was a homosexual and his plan to extort money from Norwood but mentioned nothing about the additional "homosexual ephebophilia" evidence. PCRA Court Opinion, 11/27/12, at 15-17. The court added a supplemental opinion to its PCRA opinion, describing additional instances that led it to conclude the prosecution exhibited "gamesmanship." *See id.* app., at 1-15.

being sexually abused by Norwood. Appellee timely filed his PCRA petition within 60 days of learning the substance of Draper's affidavit. Furthermore, the court noted appellee could not have known the Commonwealth interfered with his ability to present evidence of Norwood's homosexual ephebophilia until the underlying evidence was uncovered during the hearing held as a result of Draper's affidavit; therefore, appellee timely filed the amendment and supplement to his PCRA petition in order to particularize his *Brady* claim just three days after government files were opened. Accordingly, the court concluded appellee met his burden under 42 Pa.C.S. § 9545(b)(1)(i), and subsection (b)(2), so it had jurisdiction to grant relief. Finding appellee established his *Brady* claim, the court held he was entitled to a new penalty hearing. The court denied relief regarding the guilt phase. The Commonwealth filed this appeal, raising two issues for our review regarding the timeliness of appellee's fourth PCRA petition and the merits of his *Brady* claim.[8]

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8. The Commonwealth's issues, set forth *verbatim*, are:

> I. Was [appellee]'s fourth PCRA petition, in which he alleged a violation of *Brady*[] based on the non-disclosure of information he had known since before trial, untimely?
>
> II. In any event, was [appellee]'s *Brady* claim meritless where the information in question would not have been reasonably likely to change the outcome, had no apparent exculpatory value, and had been known all along by [him]?

Commonwealth's Brief, at 3.

Appendix D

Our standard of review of the PCRA court's grant of relief is clear: we examine whether the court's findings are supported by the record and whether its conclusions of law are free from legal error. *Commonwealth v. Colavita*, 606 Pa. 1, 993 A.2d 874, 886 (Pa. 2010). All PCRA petitions, "including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final" unless an exception to timeliness applies. 42 Pa.C.S. § 9545(b)(1). "The PCRA's time restrictions are jurisdictional in nature. Thus, [i]f a PCRA petition is untimely, neither this Court nor the [PCRA] court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal authority to address the substantive claims." *Commonwealth v. Chester*, 586 Pa. 468, 895 A.2d 520, 522 (Pa. 2006) (first alteration in original) (internal citations and quotation marks omitted). As timeliness is distinct from the merits of the underlying claims, we must first determine whether appellee's PCRA petition was timely filed in order to decide whether this Court has legal authority to address its substantive claims. *See Commonwealth v. Stokes*, 598 Pa. 574, 959 A.2d 306, 310 (Pa. 2008) (consideration of *Brady* claim separate from consideration of its timeliness).

This, appellee's fourth PCRA petition, was untimely on its face, as it was filed over 20 years after his judgment of sentence became final. The PCRA petitioner has the burden of proving an untimely petition falls within an exception outlined in § 9545(b)(1). *See Commonwealth v. Hawkins*, 598 Pa. 85, 953 A.2d 1248, 1253 (Pa. 2008) ("[I]t is the [petitioner]'s burden to allege and prove that one of the timeliness exceptions applies." (citation

omitted)). Furthermore, any PCRA petition filed under a timeliness exception must be filed within 60 days of when the petition could have first been presented. 42 Pa.C.S. § 9545(b)(2). "'[T]he 60-day rule requires a petitioner to plead and prove that the information on which he relies could not have been obtained earlier, despite the exercise of due diligence.'" *Commonwealth v. Albrecht*, 606 Pa. 64, 994 A.2d 1091, 1094 (Pa. 2010) (quoting *Stokes*, at 310).

Although a *Brady* violation might fall within the "governmental interference" exception, § 9545(b)(1)(i) nonetheless requires a petitioner to plead and prove: (1) the failure to previously raise the claim was the result of interference by government officials and (2) the information on which he relies could not have been obtained earlier with the exercise of due diligence. *Commonwealth v. Abu-Jamal*, 596 Pa. 219, 941 A.2d 1263, 1268 (Pa. 2008) (citation omitted). The merits of a *Brady* claim need not be addressed until it is established that the instant petition was timely filed. *Stokes*, at 310. Thus, the proper questions for our review are whether the Commonwealth interfered with appellee's ability to present a claim that Norwood was a homosexual with a sexual attraction to teenage males, and whether appellee was duly diligent in obtaining such information.

The PCRA court held it had jurisdiction under the "governmental interference" exception to the PCRA's time-bar, concluding the alleged *Brady* violations posited by appellee met the requirements of 42 Pa.C.S. § 9545(b)(1)(i). The Commonwealth contends appellee's PCRA petition failed to establish this exception, as appellee would have

known well before trial of any sexual relationship or abuse between Norwood and himself. In fact, the Commonwealth argues, if anyone knew about Norwood's homosexual proclivities toward teenage males, it was appellee himself. The Commonwealth points to the evidence of appellee's statements during the murder, taunting Norwood for "liking boys," and appellee's plan to extort Norwood by threatening to expose his homosexual activity.

Further, the Commonwealth contends appellee not only could have presented evidence of ephebophilia much sooner, but points out appellee did present just such a claim during his first PCRA proceedings in 1998, where he offered testimony from several witnesses alleging Norwood sexually abused him. The Commonwealth also posits that appellee's instant PCRA petition admitted he knew about Norwood's homosexual tendencies years before the murder. Since appellee already knew about this alleged material evidence, the Commonwealth contends any "sanitization" of evidence by the prosecution does not amount to a *Brady* violation. Accordingly, the Commonwealth asserts, appellee did not prove the timeliness exception applies, and the PCRA court was without jurisdiction to rule on appellee's petition, much less grant a stay of execution and a new penalty phase.

The Commonwealth also suggests the PCRA court attempted to circumvent a valid death sentence and undermine the integrity of this Court's ruling in appellee's first PCRA appeal. The Commonwealth refers to the ordering of what amounted to additional discovery to supplement appellee's inadequate petition, the court's

lengthy examination of the trial prosecutor after PCRA counsel finished his examination, and the admission of "court exhibits" *sua sponte*, later basing its "governmental interference" decision on one of its own exhibits. In sum, the Commonwealth contends the PCRA court "went to great lengths to expand the record, to reshape [appellee]'s claim, and to limit the Commonwealth." Commonwealth's Reply to Defendant's Response to Emergency Application to Lift Illegal Stay of Execution, 10/2/12, at 12. The Commonwealth, therefore, requests we vacate the stay of execution and the grant of a new penalty phase.

Appellee argues the PCRA court's timeliness findings were supported by the record and devoid of legal error. While appellee admits he had prior knowledge of Norwood's sexual orientation, he contends such prior knowledge is critically different from evidence of homosexual ephebophilia and sexual abuse of other teenage males. He distinguishes the failure to present the defense of rage at trial, his 1998 ineffectiveness claim, from the inability to present Norwood as unsympathetic, and repeats that knowledge of homosexuality is not the same as knowledge of homosexual ephebophilia, insofar as it relates to the ability to paint an unsympathetic picture of Norwood.

Appellee argues he met § 9545(b)(1)(i)'s exception because the Commonwealth interfered with his ability to proffer this particular *Brady* claim, and that he exercised due diligence by presenting the claim within 60 days of obtaining the facts on which the claim was based. Further, appellee asserts a PCRA petitioner's previous

knowledge of a fact applies only to § 9545(b)(1)(ii)'s newly-discovered evidence exception, not § 9545(b)(1)(i), alleging the Commonwealth is required to disclose evidence in its possession even if the defense has previous knowledge or other information about that fact, and the failure to disclose such evidence violates *Brady*, constituting governmental interference with the ability to present a *Brady* claim.

Our examination of the three omissions alleged leads to the inescapable conclusion that appellee is not entitled to relief. The missing reports were found to be relevant to Norwood's character, but the failure to explore or exploit that character was not a result of governmental interference — there is abundant evidence appellee knew of Norwood's homosexuality and conduct with teenage boys well before trial, sufficient to present him as unsympathetic before the jury. Appellee himself was a teenage male admittedly engaged in homosexual acts with Norwood. Although he denied any involvement in the crime at trial, evidence included his plan to extort Norwood by threating to expose him for being a homosexual, and statements in which Draper and appellee taunted Norwood for "liking boys" while they were beating him. N.T. Trial, 1/22/86, at 667-68; N.T. Trial, 1/23/86, at 813-14; *see also* N.T. PCRA Hearing, 9/20/12, at 219; N.T. PCRA Hearing Vol. 2, 9/24/12, at 13. Draper testified at trial that appellee told him Norwood was a homosexual. N.T. Trial, 1/23/86, at 814. We agree with the courts that have previously considered appellee's claims based on sexual orientation — there is no reasonable conclusion that the result of a trial for this horrific crime would have

been different had the missing information been provided as appellee would have liked.

Further, evidence offered at appellee's first PCRA hearing in 1998 demonstrated the extent of available knowledge of Norwood's sexual appetites. At that proceeding, counsel offered three expert witnesses, all of whom testified appellee and Norwood were in a homosexual relationship in which appellee was abused by Norwood; they suggested the murder was an "enraged killing" in response to the sexual abuse. *See* N.T. PCRA Hearing, 4/8/98, at 106, 115, 156-59, 186; N.T. PCRA Hearing, 4/9/98, at 360-61, 375-76; N.T. PCRA Hearing, 4/13/98, at 540, 542-44, 551-54, 569-70. Additionally, appellee's high school teacher, who was also a private psychotherapist, testified Norwood molested young boys, including appellee, and he learned this information from several people in early 1997. N.T. PCRA Hearing, 4/8/98, at 226-33. Appellee's friend, Donald Fisher, who was also in a homosexual relationship with appellee for approximately five years, testified appellee and Norwood began a homosexual relationship when appellee was approximately 15 years old, which lasted a few years, and Norwood was abusive, liked to inflict pain, and enjoyed having sex with teenage males. N.T. PCRA Hearing, 4/13/98, at 597, 602-05, 617. Fisher also testified appellee would engage in homosexual acts with Norwood for money, alcohol, and other gifts. *Id.*, at 617-18. Fisher learned this information not only from observing the relationship between appellee and Norwood but also because appellee told Fisher. *Id.* Additionally, the defense stated throughout the hearings that its mitigation witnesses were offered to show Norwood molested young

males and to demonstrate trial counsel's ineffectiveness in investigating the homosexual relationship between appellee and Norwood and the abuse involved in that relationship. *See* N.T. PCRA Hearing, 4/8/98, at 235-37; N.T. PCRA Hearing, 4/13/98, at 603.

Appellee's prior knowledge was also evident at his federal *habeas corpus* proceeding, during which he alleged Norwood was a closeted homosexual from whom he could extort cash by threatening to expose Norwood's secret to his wife. *Williams*, 637 F.3d at 200. Analyzing the record from appellee's first PCRA proceeding, the Third Circuit noted appellee and Norwood began their homosexual relationship when appellee was approximately 13 years old. *Id.*, at 229. The court stated Norwood was physically abusive toward appellee, once allegedly beating him with a belt. *Id.*, at 229-30. The federal district court also elicited testimony from appellee's first PCRA proceeding showing Norwood was a homosexual with whom appellee had sex in exchange for money, drugs, and gifts. *See Williams v. Beard*, 2007 U.S. Dist. LEXIS 41310, at *106 n.32 (E.D. Pa. May 8, 2007).

The PCRA court itself acknowledged appellee's arguments from the 1998 PCRA hearing supported his prior knowledge, stating appellee "elicited evidence from [] Fisher that [] Norwood was very degrading and he liked to have sex with kids. However, the current claim does not rest solely upon that evidence." *See* N.T. PCRA Hearing, 9/28/12, at 21. The court also noted the defense, at the time of trial, indeed had information suggesting Norwood was a homosexual — a statement from a witness

disclosing appellee told him Norwood "'was a homosexual and was the type to pay people.'" *Id.*, at 27-28. Appellee's PCRA counsel also referenced his prior knowledge at the hearings. *See* N.T. PCRA Hearing, 9/10/12, at 24 ("[W]e tried to present in prior proceedings evidence about the sexual abuse by [] Norwood of [appellee.]").

And quite tellingly, Draper's affidavits established he knew appellee and Norwood were in a homosexual relationship — "[appellee] had also told me that Norwood was gay" and during the murder, "[appellee] was yelling 'so you like boys, so you like boys' as he hit Norwood" — and appellee told Draper the murder was about the homosexual relationship. Draper's Affidavit, 9/11/12, at 2-4. Draper confirmed appellee's prior knowledge of Norwood's homosexual proclivities repeatedly in his PCRA testimony. *See* N.T. PCRA Hearing, 9/20/12, at 219; N.T. PCRA Hearing Vol. 1, 9/24/12, at 88, 93, 96; N.T. PCRA Hearing Vol. 2, 9/24/12, at 12-13.

The evidence alleged to comprise the *Brady* violation does not include information unknown to appellee, or information he would have been unable to find on his own. The "kidnapping" story told by Norwood's wife indicates that a probably untruthful story was told to her, but nothing more. The PCRA court apparently read between the lines and presumed the story was a lie to hide Norwood's homosexuality from his wife. And although this story was omitted from the wife's statements in the 1984 police activity sheet, it was dis closed with the pastor's statements in the same sheet. That is, appellee was already aware of this story, whatever its value, through other means. *See* Reverend's Disclosed Statement, Exhibit

C-2, PCRA Hearing, 9/20/12, at 5. Since appellee had it, the government did not interfere with his ability to obtain it.

The pastor's suggestion that he suspected Norwood may have been a homosexual would hardly have surprised appellee, who knew that for years. The government did not keep appellee from ferreting out the reverend, even if his opinion might have been admissible. The pastor's report that he once received a complaint alleging Norwood propositioned a teenage male would have been equally unsurprising. These allegations confirmed what appellee already knew — Norwood was a homosexual with attraction toward teenage males, like himself.[9] There simply is no surprise in this revelation, no new information or insinuation that only now suggests Norwood might be made to look "unsympathetic."

The third "interference" involves nondisclosure of handwritten notes of the trial prosecutor; the PCRA court concluded they recounted a specific instance of homosexual ephebophilia. *In toto*, the notes read, "[N]ot true — Mrs. House — son in play — Ronald — 16 yrs.[sic] — touched on privates — I don't do that — nobody wd [sic] have to know — brought boy home [and] asked him not to say anything @ [sic] the — he stopped coming to church — disappeared — never verified it — 29 yrs. [sic] — 1st X [sic] — never heard from others @ [sic] possible incidents." *See*

9. The reverend refused to make these statements in writing but related them to police in confidence. He stated, "[H]e himself handled the matter internally and the complaint never went any further than that." *See* Police Activity Sheet, Exhibit P-24, PCRA Hearing, 9/20/12.

Exhibit Court-2, PCRA Hearing, 9/20/12, at 2. The court *sua sponte* admitted these cryptic notes into evidence and used them to question the trial prosecutor.[10]

These murky notes, if decipherable with any degree of confidence, do not indicate the origin or veracity of their content; they do not indicate whether the notes were written during a witness interview, much less who was being interviewed. Indeed, they start with the notation "not true." They do not mention Norwood, whose connection to the notes we are asked to insinuate. One could infer they involve the incident omitted from the pastor's statements in the 1984 police activity sheet, where a mother told of Norwood's propositioning her teenage son. However, next to appellee's own evidence at the 1998 hearing, it adds little or nothing whatsoever to the information available and already presented. The ability to pursue the mitigating tactic of making Norwood appear unsympathetic was not created by these notes.

Lastly, we note a measure of bootstrapping in appellee's argument. It is difficult to conclude appellee learned something new from Draper's latest affidavit, as Draper's information was derived from appellee's own statements to Draper prior to and at the time of the murder. Further, Draper's suggestion that appellee was enraged at the time of the murder depends on Norwood's prior abuse of appellee, which necessarily establishes

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10. Although the Commonwealth contends the PCRA court violated Pa.R.Crim.P. 902(E)(1) in the "Statement of the Case" section of its brief, *see* Commonwealth's Brief, at 19, the Commonwealth does not raise a discovery issue on appeal; thus, we will not address discovery matters. *See* Pa.R.A.P. 302(a).

appellee's knowledge of Norwood's proclivities before trial. Thus, any failure to previously raise this claim was not the result of governmental interference. *See Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726, 730 (Pa. 2002) ("[N]o *Brady* violation occurs where parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence." (citation omitted)); *see also Commonwealth v. Morris*, 573 Pa. 157, 822 A.2d 684, 696-97 (Pa. 2003).

Like appellee's failed effort to establish a timeliness exception, his *Brady* claim provides no grounds for PCRA relief because the claim is inapposite to the necessary materiality inquiry. The United States Supreme Court has never held *Brady* materiality is measured in terms of "effects on the defense strategy." *See Commonwealth v. Weiss*, 622 Pa. 663, 81 A.3d 767, 810-11 (Pa. 2013) (Castille, C.J., concurring, joined by Eakin, J.). Further, *Brady* does not permit a defendant to shield himself from his prior perjury at trial. *See id.*, at 811-13.

Appellee's *Brady* theory suggested that had he received additional information about Norwood's homosexual proclivities, his defense would have learned his actual motive for the murder, *i.e.*, rage over being sexually abused by Norwood, which, in turn, would possibly lead to a new strategy where appellee does not perjure himself and Norwood is portrayed unsympathetically. Yet, at the time of trial, appellee was aware of potential witnesses and information that would establish Norwood's homosexual attraction to teenage males. Appellee could have used his prior knowledge and his counsel's due diligence to

obtain additional information and witnesses to support a different trial theory than that presented. He could have argued Norwood's homosexual proclivities developed into sexual abuse, leading to rage and ultimate murder of Norwood. He could also have created a portrait of Norwood consistent with that now proffered. However, appellee chose not to do so.

Instead, appellee perjured himself at trial, testifying he did not know the victim, had never seen him before, took no part in the murder, and had no reason to be angry with him or wish to harm him. The defense he chose to present disclaimed knowledge of Norwood, which is antithetical to what he knew and could have presented — evidence that showed Norwood as a molester, which may have led to establishing a motive of rage, or evidence allowing him to depict Norwood as an unsavory character and sexual predator. Given the choice of defense, such strategies were not relevant.[11] Given the details of appellee's crime, showing the jury the victim was "unsympathetic" was not a plan that was likely to cause reciprocal sympathy for the man who bludgeoned him and incinerated his body. Regardless, this alleged "sanitized information" claim, coupled with the possible effect on appellee's defense strategy, lacks any basis under *Brady*, as it is neither exculpatory nor material. *See Weiss*, at 810-13

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11. Trial counsel indicated at a hearing on appellee's post-sentence motions that he was left with using appellee's youth as a potential mitigating factor — since appellee provided him little, if any, assistance, he was frustrated in efforts to present a compelling group of character witnesses on his behalf. *See* N.T. Post-Sentence Motions, 4/24/87, at 21-27.

(Castille, C.J., concurring, joined by Eakin, J.). In sum, the Commonwealth did not obstruct appellee's ability to present Norwood as unsympathetic. Appellee had prior knowledge of the information on which he based his *Brady* claim, and could have presented the claim much sooner — prior to trial or at any time over the last 20 years. Because appellee's theory was built on perjury, and the information on which he relied was not exculpatory, the PCRA court erred in finding his claim material under *Brady*. Accordingly, the record does not support the PCRA court's finding appellee established his burden of proof regarding the "governmental interference" exception. *See Abu-Jamal,* at 1268 (citation omitted). Because the PCRA court was thus without jurisdiction to consider the merits of this petition, *see Hawkins*, at 1252 (citations omitted), we vacate the court's order, dismiss this petition as time-barred, and reinstate the judgment of sentence of death. The Prothonotary is directed to transmit the complete record in this case to the Governor pursuant to 42 Pa.C.S. § 9711(i).

Order vacated; petition dismissed; judgment of sentence reinstated.

Jurisdiction relinquished.

Mr. Chief Justice Castille and Messrs. Justice Baer and Stevens join the opinion.

Mr. Chief Justice Castille files a concurring opinion.

Mr. Justice Saylor and Madame Justice Todd concur in the result.

Appendix D

Judgment entered:
Dated: December 15, 2014

/s/_____
John W. Person, Jr., Esquire
Deputy Prothonotary

APPENDIX E — CONCURRING OPINION OF CHIEF JUSTICE CASTILLE, DATED DECEMBER 15, 2014

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 668 CAP

Appeal from the Order of the Court of Common Pleas, Criminal Division of Philadelphia County, Criminal Division, entered on September 28, 2012, at No. CP-51-CR-0823621, granting a Stay of Execution

SUBMITTED: September 18, 2013

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

TERRANCE WILLIAMS,

Appellee.

No. 669 CAP

Appeal from the Order of the Court of Common Pleas of Philadelphia County, Criminal Division, entered on September 28, 2012, at No. CP-51-CR-0823621, granting a Stay of Execution

SUBMITTED: September 18, 2013

Appendix E

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

TERRANCE WILLIAMS,

Appellee.

CONCURRING OPINION

DECIDED: December 15, 2014

MR. CHIEF JUSTICE CASTILLE

I join the Majority Opinion. Indeed, in my view, both the *Brady*[1] claim appellee initially raised, and the *Brady* claim later uncovered by the PCRA[2] court and upon which the court granted relief, are time-barred and frivolous. I write separately to expand upon the Majority discussion, and to address the important responsibilities of the PCRA trial courts in serial capital PCRA matters, an issue brought into stark relief by the extraordinary, and unauthorized, measures undertaken by the PCRA court in this case.

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1. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

2. Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546.

Preliminarily, with respect to the latter concern, I note that this is a case involving a **fourth** PCRA petition filed by federal lawyers only after appellee was denied federal *habeas corpus* relief. The fourth petition was time-barred on its face — offering a new, recanting witness (a friend and cohort of appellee) for the same "facts" and theory appellee had long-known and already litigated — and was blatantly frivolous, filed by the FCDO[3] in a transparent effort to induce further delay. Rather than decide the claim actually presented in the efficient manner this sort of last-ditch capital litigation requires, the court below unfortunately strayed from its institutional duties. In the process, the PCRA court: ignored the strictures of PCRA jurisdiction and the appropriate parameters for discovery procedures and evidentiary hearings in serial petition matters; misapprehended what *Brady* discovery encompasses; misapprehended the substantive law concerning *Brady* materiality; and, most troubling, lost sight of its role as a neutral judicial officer. As a result, a warrant of execution was enjoined by a trial judge for no valid reason, on the basis of a frivolous fourth PCRA petition, leaving insufficient time for this Court to timely review the judge's injunction of the Governor's warrant.[4]

The PCRA court per the Honorable Teresa Sarmina, justified its actions based on what it viewed as gamesmanship by the Commonwealth in allegedly

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3. Federal Community Defender's Office.

4. Appellee cross-appealed the order below, presumably to the extent the PCRA court denied his other claims, but later discontinued that appeal by praecipe. *See* 673 CAP.

withholding relevant information from appellee. If trial level prosecutorial "gamesmanship" is revealed and is relevant, it obviously warrants notation and condemnation. But, to be relevant in a case involving a fourth PCRA petition raising a *Brady* claim, the petition would have to be proven timely (to vest jurisdiction), and the uncovered *Brady* claim would need to possess merit, which both the claim raised in this petition, and the different claim found by the PCRA court, do not. Furthermore, in the *Brady* arena, before condemning officers of the court, the tribunal should be aware of the substantive status of *Brady* law both at the relevant time and today.[5] And, just as a preview: *Brady* does not authorize searching through

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5. To the extent the alleged non-disclosures here involved matters found when the PCRA court searched police files, it should be stressed that the investigation and prosecution (murder in 1984; conviction in 1986) preceded, by many years, the U.S. Supreme Court's decision in *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), which first held that the prosecution's *Brady* obligation extends to exculpatory materials known to others acting on the relevant government's behalf, including the police. Prior to *Kyles*, in Pennsylvania, the law was that prosecutors were not responsible for the content in police files. *See Commonwealth v. Burke*, 566 Pa. 402, 781 A.2d 1136 (Pa. 2001) (abrogating prior cases). The consequent distortions in this case are not unusual in this unique area of law where cases continue to be litigated decades after trial, and federal lawyers contend that new rules or innovative rules govern collateral attacks on old cases. Any finding of misconduct respecting this nearly thirty-year old case, then — and I do not dispute the concern, even if there was zero exculpatory material to support a viable *Brady* claim — must be tempered by awareness of the governing law at the relevant times, as well as the fact that the *Brady* focus is not on any evidence, but only on exculpatory evidence and materiality.

the government's files — not at trial, not on collateral attack, and especially not on a fourth PCRA petition. This case presents a supervisory issue concerning the manner in which trial courts handle serial petitions in capital cases that I believe requires highlighting and disapproval.

As noted, I will write also to expand upon why the claim raised by appellee, as well as the different claim discovered by the PCRA court, misconceives *Brady*.

I. The FCDO Agenda as Necessary Prologue

As I noted in a recent case involving a retroactive *Atkins*[6] claim raised by the FCDO: The FCDO's significant federal resources, "represented by its cadre of lawyers and roster of experts, are deployed throughout the Commonwealth; individual trial courts, and county prosecutors for that matter, who see only the occasional capital case, may be unaware of the bigger picture, and the strategy at work. This extraordinary shadow capability of the FCDO, and its demonstrated tactics, give me additional pause." *Commonwealth v. Hackett*, 99 A.3d 11, 40-41 (Pa. 2014) (Castille, C.J., concurring). It has only recently emerged just how pervasive a presence the FCDO has made itself in Pennsylvania capital cases. Almost invariably without legitimate court appointment, and without any Pennsylvania authority's approval or role of oversight, this "private" group of federal lawyers pursuing an obstructionist anti-death penalty agenda have

6. *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

essentially anointed themselves as a statewide, *de facto* capital defender's office. Common tactics of the FCDO include multiple attempts to delay and obstruct cases, as well as attempts to unsettle and undermine Pennsylvania law. *See generally Commonwealth v. Spotz*, 99 A.3d 866 (Pa. 2014) (Single Justice Opinion on Post-Decisional Motions by Castille, C.J.) (collecting cases and tactics).

One common tactic is that, immediately after one round of review fails, the FCDO "discovers" a new claim and initiates a new round of delay-inducing review. *See, e.g., id.*; *Commonwealth v. Porter*, 613 Pa. 510, 35 A.3d 4 (Pa. 2012); *Commonwealth v. Abdul-Salaam*, 606 Pa. 214, 996 A.2d 482 (Pa. 2010). In this case, that is exactly what the FCDO did. Appellee already had a full direct appeal, three rounds of PCRA review and appeal, and a full round of federal *habeas corpus* review and appeal when the FCDO happened upon "new" evidence and filed this fourth PCRA petition which, in fact, merely reiterated the same evidence and a theory it had already litigated and which was found to be meritless. The PCRA court below should have decided the claim actually presented to it, while maintaining a proper perspective. And, it has become apparent that PCRA courts throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group, to ensure that the FCDO does not turn PCRA proceedings, and in particular serial proceedings, into a circus where FCDO lawyers are the ringmasters, with their parrots and puppets as a sideshow.

Appendix E

II. The *Brady* Issue Raised by the FCDO was Time-Barred and Frivolous

This fourth PCRA petition was filed by the FCDO in March of 2012, immediately after appellee's federal *habeas* attack on his conviction failed. Appellee's final appropriate prospect for relief was through mercy: the clemency process. The FCDO was appointed to represent appellee for purposes of pursuing state clemency. Nevertheless, the FCDO proceeded to file yet another PCRA petition.

The FCDO alleged prosecutorial suppression of information allegedly provided to the police and the prosecutor during witness preparation sessions by appellee's friend and cohort-in-murder Marc Draper — who was convicted for his own role in the murder and is serving life in prison, who testified contrarily at appellee's trial, and has nothing to lose by now lying for his friend — and the Reverend Charles Poindexter. Draper claimed that he had told the arresting officers, as well as the prosecutor, that the victim, Amos Norwood, was a homosexual, that Norwood and appellee were involved in a sexual relationship, and that the murder was about that relationship. What was obfuscated by Draper and the FCDO was that this information could only have been learned through appellee's own communications with Draper, since appellee obviously knew his "true" motivation; or else it was just Draper's irrelevant opinion. Draper further claimed that police told him to testify that the motive for the murder was robbery. Appellee also included a "declaration" from Poindexter (who had testified for the Commonwealth at the guilt phase of trial),

claiming he had learned from police that the victim would sometimes meet gay men in a house or an apartment.

From this information, the FCDO constructed a claim that the Commonwealth suppressed "exculpatory" evidence of the relationship between appellee and the victim and appellee's supposed "true" motivation for the murder — again, as if appellee himself did not know his own true motivation — which could have been used to rebut elements of first-degree murder and to undermine the death penalty. The argument was akin to a "bad faith" argument, *i.e.*, the Commonwealth had argued that a churchgoing man was robbed and murdered by appellee and Draper, despite knowing that appellee may have had a different relationship with the victim, and a different motivation that he was keeping to himself.

As the Majority explains, the information alleged in this fourth petition not only was obviously known to appellee, but it also was irrelevant to the trial proceedings (the focus of *Brady*) because the defense — offered through appellee's testimony — was one of innocence and non-involvement. In short, appellee chose to lie. In addition, the Draper and Poindexter statements — conveniently secured by the FCDO only after losing in federal court — rehashed the same information concerning the victim's character and appellee's "true" motivation for the murder already litigated in the first PCRA proceeding. Thus, the FCDO's last-ditch *Brady* claim consisted of evidence already known to appellee, a claim already litigated by appellee, and a contrary defense theory springing from an admission that appellee perjured himself at trial. The

PCRA court should have taken the frivolous issue as the FCDO presented it and dismissed it as time-barred. The court inexplicably did not; and instead, the frivolous issue now before this Court is a different *Brady* claim never raised by appellee until prompted to do so by the PCRA court, after the issue was uncovered by the PCRA court itself only by losing sight of fundamental precepts, including its role as neutral arbiter.

III. PCRA Court's "Discovery"

A PCRA court is without jurisdiction when a serial petition is filed (assuming it is filed more than one year from the date the judgment of sentence became final, as it was here) unless it falls within one of three limited exceptions. 42 Pa.C.S. § 9545. In all PCRA petitions, the burden is on the PCRA petitioner to establish an exception to the one-year jurisdictional time-bar, before the court can act. Moreover, the rules governing discovery in PCRA matters explicitly state that no discovery is permitted for first counseled petitions except "upon leave of court after a showing of good cause," Pa.R.Crim.P. 902(E)(2); while in serial cases such as this one, discovery is not permitted "except upon leave of court after a showing of exceptional circumstances." Rule 902(E)(1). These are this Court's Rules: not niceties to be done away with perhaps because of some unease with capital cases.

Nothing in the Rules authorizes a PCRA court to demand the government's thirty-year-old files and for the court itself to go searching for information and new claims — all without jurisdiction being established. This

is true whether the case is a capital case or not — the difference of a death sentence does not create jurisdiction, or derivative power, where it does not exist.

These Rules are neither arbitrary nor mere aspirations. The PCRA Rules square with *Brady*, which does not command an open-file policy, or a "sporting system" of discovery. *See Brady*, 373 U.S. at 90-91. Thus, even where, unlike here, serial petition jurisdiction is established and the petitioner demonstrates exceptional circumstances to warrant some form of discovery, such orders do not properly encompass simply seizing and rummaging about in the government's files.

> [T]he [U.S. Supreme] Court has noted that the duty imposed upon the prosecution under *Brady* is a limited one. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) ("[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one"); *see also Kyles*, 514 U.S. at 436-37, 115 S.Ct. at 1567 ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.... We have never held that the Constitution demands an open file policy ...."). This Court has also recognized *Brady*'s limited requirements, and has noted that *Brady* does not grant a criminal defendant unfettered access to the Commonwealth's files. *See Commonwealth v. Edmiston*, 578 Pa. 284, 851 A.2d 883, 887 n. 3 (2004) (defendant has no

> general right under the Constitution or *Brady* to search Commonwealth files); *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167, 1176 (1999) ("[T]he Commonwealth is, in the first instance, the judge of what information must be disclosed.... 'Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance.'") (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 59, 107 S.Ct. 989, 1002, 94 L.Ed.2d 40 (1987)); *Commonwealth v. Counterman*, 553 Pa. 370, 719 A.2d 284, 297 (1998), *cert. denied*, 528 U.S. 836, 120 S. Ct. 97, 145 L. Ed. 2d 82 (1999) (*Brady* is not a general rule of discovery in criminal cases).

Commonwealth v. Lambert, 584 Pa. 461, 884 A.2d 848, 854 (Pa. 2005).

This Court's Rules, likewise and for similar good reason, do not empower a PCRA judge to hold evidentiary hearings in a serial petition case in advance of a demonstration of jurisdiction. Appellee already had five full rounds of review. Hearings are appropriate — after jurisdiction is established — only if there has already been an actual demonstration of a genuine issue concerning any material fact. *See* Pa.R.Crim.P. 908(A)(2), 909(B)(2). A new and different *Brady* claim discovered by the PCRA judge's own unauthorized, and unlimited, "investigation" — conducted after a serial PCRA petition is filed and not yet assessed for jurisdiction — cannot operate to render the petition timely when filed. Likewise, information

obtained from the government's files after the PCRA court improperly ordered seizure of the information without foundation cannot retroactively operate to validate the improper serial petition "discovery" order (or "seizure" order, in this case) in the first instance.

During one of the earliest hearings after an execution date was set in this matter, the PCRA court recognized that Draper's affidavit was insufficient to warrant an evidentiary hearing. Nevertheless, the court essentially directed appellee to procure a third affidavit from Draper to see whether appellee could establish a strong showing of success on the merits which, in the mind of the court, was necessary in order to warrant an evidentiary hearing with a death warrant pending. N.T., 9/10/12, at 86-87. Following submission of the third affidavit, the court then ordered an evidentiary hearing to receive testimony from Draper and the trial prosecutor (who was no longer with the District Attorney's Office). Prior to this hearing, the court entered an order prohibiting the parties from communicating about the case with Draper or the trial prosecutor and further ordered the trial prosecutor to bring any documents in her possession related to the case to the evidentiary hearing. The court then ordered the prosecutor's office to give access to the case files to the trial prosecutor, via an e-mail the judge sent to the parties.

A subsequent e-mail from the court took the even more lawless step of essentially opening the prosecutor's files to appellee's counsel, as the judge directed that appellee was permitted to review any of the documents reviewed by the trial prosecutor. Then, in another e-mail sent on Saturday,

September 22, 2012, the court's clerk directed the Commonwealth to secure the police department's homicide files in this case and the Herbert Hamilton murder case[7] because "the judge wants to review everything in the possession of the police department about these two cases." *See* Attachment to "Commonwealth's Motion to Complete the Record," filed 10/26/12. The PCRA court's examination of these files provided the basis for the examination of the witnesses at the evidentiary hearing, including an extended cross-examination by Judge Sarmina herself.

Ignoring the jurisdictional time-bar and the rules of procedure, and all in a truncated death warrant time-frame leaving little time for appellate review in two court systems, the PCRA court essentially seized the files of the Commonwealth and the police for no legitimate reason (and certainly not based upon the required actual defense showing of exceptional circumstances), independently reviewed the materials, and then used that which was uncovered by the court to examine witnesses at an evidentiary hearing again scheduled for no legitimate reason. The court also entered some of the documents into the record on its own without any motion or prompting by appellee. Only thereafter, during the September 25th hearing, did appellee ask permission to amend the fourth PCRA petition to include the new allegations raised by the documents the judge had found, and the court immediately granted the request, reasoning that

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7. Herbert Hamilton, another older man with whom appellee had a sexual relationship, was the first person appellee murdered.

Appendix E

Chapter 900 of the Rules of Criminal Procedure — the same chapter containing the Rules respecting discovery and evidentiary hearings that were of no concern to the judge — supposedly indicated that there should be a liberal ability to amend, "even if it is at this late stage." N.T., 9/25/12, at 78.

Unfortunately, the PCRA court apparently allowed itself to be compromised by the fact that this was a capital case that was proceeding under an execution warrant. But, that is what happens, thirty years on, after a condemned capital petitioner has already exhausted five full rounds of review, and his federal lawyers try another longshot at delaying the case. Also, in taking these extreme, activist measures, the court cited a belief — proper enough in some spheres, and thus recognized in specific doctrines — that "death is different." The judge added: "This is not any regular, old PCRA, including in a non-capital case." N.T., 9/14/12, at 69. No, it was not an ordinary case, but not for the reason cited by the court: it was a last-ditch fourth state collateral petition, filed by the FCDO no less, after federal review had concluded, rehashing old claims that just happened to involve a two-time murderer finally facing the execution of his sentence.

This case demonstrates that the "difference of death" when reduced to an unmoored slogan causes mischief. The slogan does not create PCRA jurisdiction, and jurisdiction must be proven before the PCRA court can act. The difference of death is not a ground for ignoring this Court's Rules of Procedure, which specifically apply to — and in many instances exist specifically because of — capital

cases. The difference of death also does not alter a trial court's crucial role as a neutral arbiter to pass upon the timeliness, and if timely, the merits of the claims that a serial PCRA petition actually raises. Five Ninth Circuit jurists recently commented on the abuse of the "death is different" notion in a dissent, explaining that the rule of law must be paramount:

> Whatever they are, motivations are beside the point. We should follow the law. Instead, we lay flame to orderly case-processing rules, comity due to state court judgments, and principles of finality. "[Fire's] real beauty is that it destroys responsibility and consequences. A problem gets too burdensome, then into the fire with it." Ray Bradbury, *Fahrenheit 451* 109 (Simon & Schuster 2012). We should be more cautious.

Henry v. Ryan, 766 F.3d 1059, 1072 (9th Cir. 2014) (Tallman, J., dissenting, joined by O'Scannlain, Callahan, Bea, & Ikuta) (dissenting from grant of *en banc* review in case where time for Circuit reargument had long passed, and U.S. Supreme Court had already denied *certiorari*). Ultimately, the PCRA court here lost sight of its limited, albeit crucial, role.

As a consequence, the PCRA court steered its own course away from the actual *Brady* claim presented in this time-barred serial petition; and the *Brady* claim forming the basis for the penalty phase relief the PCRA court granted could not retroactively establish jurisdiction so as to justify the lawless discovery and evidentiary

hearing that had already occurred per the court's *sua sponte* directives. To make matters even worse, the claim the court discovered on its own was simply a different, frivolous *Brady* claim.

IV. *Brady* Law

The 1984 murder here was appellee's second murder. His first murder victim, Herbert Hamilton, was another man with whom he had a sexual relationship, a relationship appellee denied. At the trial in this case, appellee testified to his absolute innocence, claiming he did not even know the victim. As all now agree, this sworn testimony was a lie since appellee not only knew the victim, but he had an ongoing homosexual relationship with him. But, it is the story appellee elected to tell the jury in the hopes, however desperate, of an acquittal. It is not the first time a criminal defense was premised upon a lie, but it is a defendant's right to pursue the defense he chooses (even if it risks a subsequent perjury prosecution, which is hardly a disincentive to a serial murderer in appellee's circumstances).

The new *Brady* claim discovered by the PCRA court's efforts involved "dirt" about the victim: that he was a "homosexual ephebophiliac" who had sexual encounters with male teenagers. Specifically, as explained by the Majority, the claim was that information that the victim was a homosexual ephebophiliac could have been employed to paint an unsympathetic picture of the victim at the penalty phase. Majority Slip op. at 17. Nothing in the death penalty statute, however, makes slander about a victim a

relevant consideration. The death penalty statute does not recognize an exception if the murder victim was a sexual deviant, or even a convicted sex offender; and smearing the victim's character would not rebut the two aggravators the jury found: the commission of a felony (robbery) along with the murder, and the significant history of violent felony convictions, which included the murder of Hamilton, and a Christmas Eve, home invasion gunpoint robbery of an older couple — where appellee pressed a rifle to the woman's neck and threatened to blow "her fucking head" off, and then fired multiple shots into the wall. Nor would such evidence be probative of a mitigating circumstance. *See Commonwealth v. May,* 587 Pa. 184, 898 A.2d 559, 566 (Pa. 2006) (testimony designed only to smear murder victim's character not relevant; noting as "apt" trial court's analysis that: "it's just as illegal to kill the devil as it is to kill a saint"). And, when the defendant takes the stand and swears he had nothing to do with killing the victim, and did not even know him, it clearly limits his penalty phase options respecting mitigation arising from "the circumstances of the offense."

The linking assumption depends upon a pet *Brady* theory the FCDO has been raising recently, *i.e.*, that *Brady* is violated by non-disclosures which, though involving information neither exculpatory nor material in and of itself, in hindsight might have been used by trial counsel to keep the defendant from testifying and perjuring himself, thereby altering the focus of the necessary *Brady* materiality inquiry. *See Commonwealth v. Weiss,* 622 Pa. 663, 81 A.3d 767 (Pa. 2013) (Castille, C.J., concurring, joined by Eakin J.) (further discussed

and quoted *infra*). In the iteration posed here, the theory goes something like this: had additional information about the victim been disclosed, the defense would have learned appellee's "real" motive for murder (again, as if appellee did not know his motive), and perhaps trial counsel could have convinced appellee not to take the stand and lie, thus opening the door to an attack-the-victim defense at the penalty phase. Even setting aside the irrelevancy of bad character information about a murder victim, *Brady* does not embrace this sort of perversity, a theory that rewards the defendant's trial perjury.

Furthermore, even if the PCRA court found something "unsporting" about the government's conduct revealed in the government's files that the court seized, and even if evidence of poor "sportsmanship" in discovery angered the judge, that is not the basis for a *Brady* claim. What matters is the legal point, made by the Majority, that there was nothing exculpatory or material in this information.[8]

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8. In concisely summarizing why the PCRA court erred in finding that appellee's reconfigured-by-the-PCRA-court claim did not qualify under the governmental interference exception, based upon information appellee himself had known before trial, and supplemental information which he secured for use in a prior PCRA petition over fifteen years before, the Commonwealth succinctly explains:

> When, at trial, defendant considered it in his interest to deny any sexual relationship with his victims so as to distance himself from their deaths, he made the strategic decision, **independent of any information in the government's possession**, to do so. And when that did not work, and he decided it was in his interest

Appellee always knew of the victim's supposed proclivities; again, the current claim is just another version of the claim raised and litigated by the FCDO fifteen years ago. Nevertheless, the PCRA court drew a legal conclusion that the evidence respecting the victim was subject to *Brady* disclosure before the 1986 trial; and, if only the prosecution had disclosed non-exculpatory information already known to appellee about the victim's character, it may have changed appellee's guilt phase decision to testify; and, the theory goes on in speculation, may have altered the outcome of the penalty proceeding. *See* Appellee's Brief, at 29-30 (quoting PCRA court opinion).[9]

> to instead claim in his first PCRA petition that he killed the victims [both here and in the Hamilton case] because they sexually abused him, he had no difficulty marshalling evidence **outside the government's possession** to support that version of events. At no point was his ability to defend against the charges, or to present any claim, constrained by the actions of the trial prosecutor or any other government official. Consequently, his untimely fourth PCRA petition, which he filed more than twenty years after his judgments of sentence became final, did not satisfy the governmental-interference exception to the one-year filing deadline. His petition was time-barred, and the PCRA court's order purporting to grant relief was a jurisdictional nullity that should be reversed.

Commonwealth's Brief as Appellant, 34 (emphasis original).

9. In point of fact, appellee never so much as offered to prove that, but for the alleged non-disclosure, he would have presented evidence detailing his ongoing, prior sexual relationship with the victim, and then claimed that the relationship was why he murdered the victim. Furthermore, the decision to testify was defendant's

The notion that this sort of evidence, in the context of a trial where appellee testified and denied any involvement, warrants *Brady*-based penalty phase relief, is ludicrous.

As the Majority notes, the U.S. Supreme Court has never held that *Brady* materiality is measured by the FCDO's effect-on-the-defense-trial-strategy theory; and a serial collateral attack is not the proper place to establish such constitutionally innovative new rules. Moreover, it would be absurd to grant *Brady* relief upon a claim that would involve rewarding a defendant for his own deliberate perjury at trial. I explained the error in this theory in my Concurring Opinion in *Weiss*:

> The *Brady* analysis argued by appellant is erroneous for several reasons. First, the U.S. Supreme Court has never embraced his interpretation. Indeed, appellant's claim to the contrary is premised upon a mischaracterization

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alone; his trial counsel's role was limited to consultation. In this regard, it is notable that, in the prior PCRA proceeding, where appellee litigated the same basic claim, trial counsel testified that he had negotiated a plea deal where appellee would receive life in prison — the best possible circumstance where appellee faced the death penalty, had substantial aggravators, and the fact of the robbery meant that his best, realistic prospect was a conviction for second-degree murder, which carries a mandatory life sentence. Counsel consulted with appellee. But, counsel testified, appellee was adamant that he was not willing to exchange his prayer of a hope for an outright acquittal for a term of life imprisonment. Appellee told counsel he would rather be executed than spend his life in jail. No claim but innocence could lead to acquittal, and appellee decided to go that route by then perjuring himself.

of *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Appellant states the following proposition as if it were black-letter law: "The proper *Brady* inquiry asks what 'course that the defense and the trial would have taken had the defense not been misled' and what impact the misconduct had on 'the preparation or presentation of the defendant's case.' *Bagley*, 473 U.S. at 683, 105 S.Ct. 3375." . . . From his assertion that mere effects upon defense preparation, rather than hard evidence, is the measure of *Brady* materiality, appellant argues his more radical extended rule that he may shield himself from his own prior testimony.

However, *Bagley* supports neither appellant's "defense effects" root rule, nor his testimonial immunity extension of the rule. Appellant's [FCDO] counsel neglect to note that the *Bagley* language they cite and quote as governing black-letter law in fact represented the views of only two Justices in *Bagley*. It is not governing law. I examined and explained the non-precedential effect of this language at some length in my concurring opinion in *Commonwealth v. Willis*, 616 Pa. 48, 46 A.3d 648 (2012), a direct appeal case. *See id.* at 674-84 (Castille, C.J., concurring, joined by Eakin and McCaffery, JJ.) (addressing Court's erroneous apprehension of *Brady* materiality in *Commonwealth v. Green*, 536 Pa. 599, 640 A.2d 1242, 1245 (Pa. 1994)).

Moreover, nothing in the logic of *Brady* materiality suggests a design to shield a defendant from his prior testimony or perjury. The test for *Brady* materiality is the same as the test for *Strickland [v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] prejudice: whether there is a reasonable probability that the outcome of the proceeding would have been different. *See Kyles v. Whitley*, 514 U.S. 419, 433-35, 115 S.Ct. 1555, 131 L.Ed.2d 490 (U.S. 1995) (noting that *Bagley* adopted *Strickland* formulation for *Brady* claims). The test, whether for *Brady* or *Strickland*, looks to the proceeding that actually occurred and attempts to assess its underlying fairness. *See id.* at 451, 115 S.Ct. 1555; *see also Bagley*, 473 U.S. at 678, 105 S.Ct. 3375. The High Court has never held that courts, charged with assessing *Brady* materiality by re-examining the trial that occurred in light of previously suppressed evidence, are obliged to diminish the record at that trial. Accordingly, appellant's theory is a non-starter. The expansion, if there is to be one, should come from the High Court.

Second and relatedly, this is a PCRA appeal. An assessment of the fairness of appellant's trial — whether he poses a *Brady* claim, a *Strickland* claim, or any other claim — is not measured by minority views in prior decisions or by hopeful predictions of where federal decisional law might someday go; it is measured by the

existing law that governs. The only federal decisional law that governs in Pennsylvania is that commanded by the U.S. Supreme Court .... And, errors in such predictions [of where the law might develop] favoring the defense run the risk of arbitrarily releasing murderers.

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Finally, I believe it is extremely unlikely that the U.S. Supreme Court would adopt a *Brady* materiality extension ... which would immunize a defendant against the effects of his own trial testimony, much less his own false trial testimony. To borrow from the *Strickland* jurisprudence from which *Brady* materiality derives:

> It is true that while the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as *Strickland* itself explained, there are a few situations in which prejudice may be presumed.... And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate

> "prejudice." Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. *Nix v. Whiteside*, 475 U.S. 157, 175-176, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).
>
> Similarly, in [*Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)], we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by our opinion in *Strickland*.... Because the ineffectiveness of Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him, we held that his claim did not satisfy the "prejudice" component of the *Strickland* test.

Williams v. Taylor, 529 U.S. 362, 391-93, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (citations and footnotes omitted). *Cf. Commonwealth v. Cox*, 581 Pa. 107, 863 A.2d 536, 556-

> 57 (2004) (Castille, J., concurring) (strong argument to be made that heightened prejudice standard under *Lockhart* should be applied to ineffectiveness claims with "fundamental substantive issues that would have to be resolved in defendant's favor before relief could be granted"); *United States v. Day*, 285 F.3d 1167, 1171 (9th Cir. 2002) ("Because a defendant does not have a 'right' to commit perjury without suffering the consequences, the fact that counsel's ineffectiveness gave [defendant] an opportunity to commit perjury does not constitute deprivation of a right; accordingly, this portion of the sentence does not satisfy the prejudice component of *Strickland*."). Again, in explicating both *Brady* and *Strickland*, the High Court has stressed the overriding concern of whether the defendant has received a fair trial. Fairness works two ways, the High Court teaches. When the defendant takes the stand and elects to testify, and then testifies absurdly or untruthfully, I doubt that the U.S. Supreme Court would hold that *Brady* requires courts to pretend that his testimony never existed.

Weiss, 81 A.3d at 810-13 (Castille, C.J., concurring, joined by Eakin, J.) (footnotes omitted).

For these specific reasons, in addition to those set forth by the Majority on the time-bar and the merits, the new *Brady* claim fashioned by the PCRA court here provides no grounds for serial petition jurisdiction, much less PCRA relief.

V. Conclusion

The FCDO's agenda and tactics by now should be predictable: this group has been aptly described, by a federal judge, as "gaming a system and erecting roadblocks in aid of a singular goal — keeping [the defendant] from being put to death." *See Abdul-Salaam v. Beard*, 16 F. Supp. 3d 420, 511 (M.D. Pa. 2014). That gaming is bad enough; but, what is disheartening here is that the PCRA court became unmoored from its lawful duty. Trial courts faced with serial petitions in capital cases must be vigilant to protect against frivolous claims, and must be aware of their own actual duties; the PCRA judge here was not.

APPENDIX F — OPINION OF THE PHILADELPHIA COURT OF COMMON PLEAS, SUPPORTING THE GRANT OF PENALTY-PHASE RELIEF, DATED NOVEMBER 27, 2012

PHILADELPHIA COURT OF COMMON PLEAS CRIMINAL TRIAL DIVISION

CP-51-CR-0823621-1984

Supreme Court Docket No.:
669 CAP

COMMONWEALTH OF PENNSYLVANIA

v.

TERRANCE WILLIAMS

Sarmina, J.
November 27, 2012

OPINION

PROCEDURAL HISTORY

On February 3, 1986, a jury convicted Terrance Williams (appellee) of first-degree murder (H-1), robbery (F-l) and criminal conspiracy (F-1) in the killing of Amos Norwood (victim).[1] After a penalty hearing that same day, the jury found two aggravating circumstances,[2] no

1. 18 Pa.C.S. §§ 2502(a), 3701, and 903, respectively.

2. The two aggravating circumstances found by the jury were

mitigating circumstances,[3] and returned a verdict of death on February 4, 1986.[4] Appellee filed post-trial motions, which were denied in a formal opinion by the Honorable David N. Savitt on July 28, 1987,[5] and then the judgments of sentence were affirmed by the Pennsylvania Supreme Court on February 8, 1990. *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990) ("*Williams I*").

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that appellee committed the killing while perpetrating a felony and that he had a significant history of felony convictions involving the use or threat of violence to the person. 42 Pa.C.S. §§ 9711(d)(6) and 9711(d)(9), respectively. The Commonwealth introduced evidence of appellee's convictions for burglarizing the home of Hilda and Donald Dorfman, and killing Herbert Hamilton, for which he was tried and convicted of third degree murder in February 1985.

3. Appellee's trial counsel, Nicholas Panarella, Esquire, presented mitigating evidence of appellee's youth at the time of the crime and his character and record. 42 Pa.C.S. §§ 9711(e)(4); 9711(e)(8). Mr. Panarella did not make any argument with respect to the victim at the penalty phase. Notes of Testimony (N.T.) 2/3/1986 at 1877-81.

4. On July 1, 1987, appellee was formerly sentenced to death on the first degree murder charge, to a term of not less than five nor more than ten years on the conspiracy charge, and to a term of not less than ten nor more than 20 years on the robbery charge. N.T. 7/1/1987 at 72-74. The conspiracy and robbery sentences were to run concurrent with the death penalty sentence, but consecutive to one another.

5. *Commonwealth v. Williams*, No. 2362-37, slip op. (Pa. Ct. Com. Pl., July 28, 1987). Judge Savitt was the trial judge, and presided over and decided the PCRA petition appellee filed in 1995.

Appendix F

Appellee filed a *pro se* petition pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq.* on March 24, 1995.[6] The PCRA Court denied the petition on October 20, 1998.[7] On December 22, 2004, our Supreme Court affirmed the PCRA Court's decision. *Commonwealth v. Williams*, 863 A.2d 505 (Pa. 2004) ("*Williams II*"). Appellee subsequently filed a second PCRA petition on February 18, 2005, which was dismissed as untimely under 42 Pa.C.S. § 9545.[8] Our Supreme Court affirmed this dismissal, without an opinion, on September 27, 2006. *Commonwealth v. Williams*, 909 A.2d 297 (Pa. 2006).

In July of 2005, appellee filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Pennsylvania. On May 9, 2007, the Honorable Michael M. Baylson denied appellee's petition for writ of habeas corpus pursuant to § 2254, but granted a certificate of appealability, pursuant to 28 U.S.C. § 2253(c)(2) with respect to two issues - whether trial counsel was

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6. Appellee's current counsel first appeared on appellee's behalf on May 14, 1996, and filed an Amended Petition on December 17, 1996.

7. Judge Savitt's formal opinion denying this PCRA petition was filed on January 13, 1999. *Commonwealth v. Williams*, No. 2362-67 slip op. (Pa. Ct. Com. Pl., Jan. 13, 1999).

8. *Commonwealth v. Williams*, No. 2362-67, slip op. (Pa. Ct. Com. Pl., May 26, 2005). In this petition, appellee claimed that the accomplice liability instruction allowed the jury to find appellee guilty of first degree murder without finding that he possessed the specific intent to kill.

constitutionally ineffective during the penalty phase of trial and whether the Commonwealth exercised its peremptory strikes in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). *Williams v. Beard*, 2007 U.S. Dist. LEXIS 41310, ** at 182-83. On March 9, 2011, the Third Circuit found that the *Batson* claim failed on its merits. *Williams v. Beard*, 637 F.3d 195, 219-20 (3d Cir. 2011). With respect to the ineffective assistance of counsel claim, the Third Circuit held that our Supreme Court's determination that appellee was not prejudiced by trial counsel's constitutionally deficient failure to present the mitigating evidence presented at the 1998 PCRA evidentiary hearings was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984).

The present litigation evolved roughly ten months after the Third Circuit's March 9, 2011 decision.[9] On January 9, 2012, appellee's counsel visited Marc Draper (Draper), the co-defendant in the Norwood killing and a principal Commonwealth witness at appellee's trial, while he was serving a life sentence for that killing at SCI-Frackville.[10] Draper signed a declaration pursuant to 18

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9. Appellee's petition for rehearing in the Third Circuit was denied on July 26, 2011. Appellee then prepared and filed a petition for writ of *certiorari* in the United States Supreme Court. The petition was filed on December 13, 2011 and denied on June 29, 2012 *sub nomine*. *Williams v. Wetzel*, 2012 U.S. LEXIS 4903 June 29, 2012).

10. Draper pleaded guilty to second degree murder before Judge Savitt on February 21, 1986 for his role in the killing of Amos Norwood. He was represented by Harry Seay, Esquire. N.T. 2/21/1986 at 1.

Pa.C.S. § 4904, in which he stated, for the first time that, during a prep session prior to trial, he told detectives that the victim was a homosexual who was in a relationship with appellee. *Declaration of Marc Draper*, 1/9/2012 at 4. (See Attachment A, which is pages 11-17 of Exhibit P-16 in the PCRA hearing before this Court). Draper also stated that the detectives "wanted the motive to be a robbery and kept coming back to that. That's how they wanted me to testify, that it was a robbery." *Id.* Appellee's counsel returned to SCI-Frackville on March 1, 2012 and obtained another signed declaration from Draper. On the basis of those two statements, appellee flied the instant PCRA petition on March 9, 2012 and an Appendix to the petition on July 16, 2012.[11]

On July 24, 2012, appellee filed Petitioner's Memorandum, in which he argued that this PCRA Court should advise Governor Corbett that he need not sign an execution warrant in this case.[12] On July 27, 2012, appellee supplemented his Memorandum with Petitioner's

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11. Appellee filed his current PCRA petition through counsel, the Federal Community Defender Office for the Eastern District of Pennsylvania ("FCDO"), who has represented him since 1996. Billy H. Nolas, Esquire, Shawn Nolan, Esquire, Eric Montroy, Esquire, and Jennifer Givens, Esquire entered appearances on appellee's behalf before this Court. Robin Godfrey, Esquire, Cari Mahler, Esquire and Ronald Eisenberg, Esquire entered appearances on the Commonwealth's behalf before this Court.

12. Judge Sonitt having retired, this PCRA matter was officially assigned to this Court on May 23, 2012. Based on the way in which the Post Trial Unit processes the PCRA paperwork, this Court first received the pleadings on or about July 24, 2012.

Appendix F

Supplemental Petition for Post Conviction Relief and Notice of Filing Additional Evidence in Support of Stay of Execution along with an Appendix to that filing. The Commonwealth responded on July 31, 2012, filing a Brief in Opposition to Motion to Stay.

On August 6, 2012, this Court briefly heard argument on the issue raised in appellee's July 24, 2012 Memorandum that this Court should advise Governor Corbett not to sign appellee's execution warrant. However, at the hearing, appellee orally withdrew the request in light of the Commonwealth's representation that Governor Corbett planned to sign appellee's execution warrant three days later, on August 9, 2012. N.T. 8/6/2012 at 4-5. The Governor signed the warrant on August 8, 2012, and scheduled the execution for October 3, 2012.

On August 28, 2012, appellee filed Petitioner's Renewed Motion for Stay of Execution, citing public policy reasons to stay appellee's scheduled execution.[13] On September

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13. *Commonwealth v. Morris*, 771 A.2d 727, 739 (Pa. 2001) ("Morris I") clearly dictates that trial courts do not have discretion to go beyond the corners of 42 Pa.C.S. § 9545(c) when determining whether or not to grant a stay of execution:

> Given that we have concluded that § 9545(c) does not violate either Article V, § 9 or 10 of the Pennsylvania Constitution and is therefore, within constitutional restraints, we hold a lower court may not exercise its inherent right to grant a stay except within the confines enumerated by § 9545(c). We are mindful of the fact that such a conclusion may seem harsh, especially where death is the ultimate result of the denial of relief in these instances, but we cannot

6, 2012, appellee filed a Motion for Discovery, requesting "any information relating to Marc Draper, Reverend Poindexter, and any informal or formal documentation pertaining to any of Marc Draper's other offenses, including, but not limited to, the Donna Friedman case" from the police homicide file.[14] *Petitioner's Motion for*

> ignore that at some point in the proceedings society's interest in finality becomes overarching. Accordingly, we conclude that a PCRA court is bound by the requirements of § 9545 and can only enter a stay when it has reasonably concluded that such requirements are met.

Despite our Supreme Court's landmark decision prohibiting trial courts from allowing factors beyond the scope of § 9545(c) to enter into the equation as to whether granting a stay of execution is appropriate, appellee's counsel exerted an enormous amount of time and resources to persuade this Court that public policy considerations merited entering a stay of execution. While a statement from the decedent's spouse and support from a myriad of sources might have been pertinent to a clemency proceeding, this Court found appellee's documentary support and oral argument in this regard to be irrelevant and a waste of the Court's time. And the Court agreed with the Commonwealth's position that seeking advisory opinions from the trial jurors as to what their verdict at the penalty phase would have been – if they had been told that the victim had molested appellee – was inappropriate and improper for a number of reasons.

14. Donna Friedman, a pregnant woman who lived in the Mt. Airy section of the city, was murdered on July 3, 1984. Police were doggedly trying to solve her murder – which remains unsolved to this day – and considered Draper and appellee suspects. In the PCRA evidentiary hearing before this Court, Draper maintained that, on July 20, 1984 – the day he was arrested for this involvement in the

Discovery, 9/6/2012 at 5. Additionally, appellee requested the production of exculpatory information contained in the Commonwealth's "secure archive"[15] as well as "any reports or notes made concerning Norwood's sexual relationship or sexual abuse of petitioner or any other child under the age of 18." *Id.* at 5-6. The Commonwealth filed its Motion to Dismiss and Opposition to Stay of Execution on September 7, 2012.

On September 10, 2012, this Court heard argument on the pleadings, and permitted appellee the opportunity to obtain and submit additional information from Draper by September 13, 2012 at 5 P.M.[16] N.T. 9/10/2012 at 101-02. The following day, this Court heard the Commonwealth's

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Norwood case – police threatened him with the death penalty for having killed Ms. Friedman. N.T. 9/20/2012 (P.M.) at 182-88. He stated that the threat of being charged with the Friedman murder was one of the reasons why he cooperated with police, and why he refrained from speaking about the Norwood murder over the years. *Id.* at 188-89. This Court found that testimony credible, and considered it as part of the determination regarding jurisdiction under 42 Pa.C.S. § 9545(b), as discussed *infra*.

15. The Commonwealth represented to this Court that it filed "secure archive information" during the federal habeas corpus litigation of this case. According to the District Attorney's Office, it was an "old mental health evaluation" in microfilm "maintained by a court or some agency, not by the Commonwealth or the police," and there was "no overlap" between that evaluation and the evidence uncovered during this PCRA litigation. N.T. 9/24/2012 at 5-6.

16. At the conclusion of the September 10, 2012 argument, appellee, who had been brought in from SCI-Greene, agreed to waive his presence at all future hearings. N.T. 9/10/2012 at 108.

argument that Draper should be appointed counsel prior to appellee's counsel being permitted to speak with him. N.T. 9/11/2012 at 8-10. The Commonwealth's motion to have counsel appointed for Draper was denied. *Id.* at 17. Appellee's counsel obtained and filed Draper's third statement, an affidavit, on September 11, 2012. (See Attachment B, which is pages 1-10 of Exhibit P-16 in the PCRA hearing before this Court).

On September 14, 2012, this Court heard further argument from appellee as to the timeliness of the current petition, after which this Court found that there was an issue of material fact meriting an evidentiary hearing pursuant to Pa.R.Crim.P. 909(B)(1) in order to determine whether government officials pressured Draper to testify that appellee's motive for the crime was to rob Amos Norwood, not to kill him because of a homosexual relationship between them. The evidentiary hearing was scheduled for September 20, 2012; Draper and Andrea Foulkes, the trial prosecutor, were the only two witnesses expected to testify.[17] Additionally, in an effort to ensure that potential pre-hearing preparation did not interfere with the credibility determinations that this Court would ultimately have to make, this Court

17. Pa.R.Crim.P. 909(B)(3) requires that an evidentiary hearing be scheduled no fewer than ten days nor more than 45 days after the date of the order setting a date certain for the hearing. In light of the extenuating circumstances in this case – merely 18 days separated the September 14, 2012 argument from the impending execution – this Court scheduled the evidentiary hearing six days after that argument. Neither party objected to the expedited evidentiary hearing.

prohibited both parties from communicating with the two witnesses prior to the hearing.[18] *Order to Comply*, 9/14/2012. On September 18, 2012, this Court ordered that the Commonwealth produce the trial files for the two cases which Ms. Foulkes prosecuted against appellee in 1985 and in 1986, and in which Draper was the key Commonwealth witness – the Herbert Hamilton and Amos Norwood murders, respectively.[19]

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18. As soon as this Court granted an evidentiary hearing, the Commonwealth's attorneys handed up a writ to have Draper, whom they had already requested to be sent from SCI-Frackville to SCI-Graterford, be transported by District Attorney's Office detectives to their office to be interviewed. N.T. 9/14/2012 at 71. The Court declined to issue the writ, but had concerns that "prepping" the two witnesses expected to testify would affect their recollection and spontaneity when testifying before this Court. *Id.* at 83-84. For this reason, the Court entered an order prohibiting any communication between counsel and the two witnesses. Prior to this Court's Order prohibiting such communication, the Commonwealth had provided Ms. Foulkes, now an Assistant United States Attorney in the Eastern District of Pennsylvania, with a CD that contained all of the pleadings relevant to the instant litigation as well as the Notes of Testimony from all hearings dating back to the Herbert Hamilton trial. N.T. 9/20/2012 (P.ML) at 34. The contents of the CD are listed in Attachment C. When this Court issued its Order, Ms. Foulkes was asked to turn over the CD, which she did. Ms. Foulkes had asked for an opportunity to review the two files to which she had been assigned, and she was permitted to do so. But this Court found that what was on the CD went well beyond that.

19. The Commonwealth did not object to this Court's directive that the trial files be produced. Both sides had an opportunity to go through these files and mark documents that they intended to utilize at the evidentiary hearing before this Court. The only aspect of the files exempted from disclosure and review was the trial prosecutor's notes regarding jury selection. This Court reviewed those files *in camera* and found them irrelevant to the instant matter other than

Appendix F

This Court conducted the evidentiary hearing on September 20 and September 24, 2012. On Saturday, September 22, 2012, this Court directed that the Commonwealth also produce the Philadelphia Police Department's files concerning the same two cases.[20] After Draper's testimony concluded on the 24th, both sides were given an opportunity to look through those police files. On September 25, 2012, the documents uncovered during the parties' review, as well as during the Court's independent review of same, were introduced into evidence.[21] Having filed Petitioner's Motion to Conform the Petition to the Hearing Evidence and to Supplement and Amend on September 24, 2012, appellee reiterated this on September 25, 2012, making an oral motion to "conform the [appellee's] proof to the evidence submitted at the hearing and to have [the Court] allow us to take the

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as discussed in the Appendix.

20. The Philadelphia Police Department provided First Assistant District Attorney Edward McCann two boxes, labeled H-84-026 (Herbert Hamilton victim) and H-84-127 (Amos Norwood victim). "H" stands for Homicide, "84" stands for the year, and the last numbers represent which murder case it was, chronologically. Mr. McCann had the two boxes immediately transported to this Court. Again, the Commonwealth did not object to this Court ordering their production and inspection.

21. The information uncovered from the District Attorney's files and the Philadelphia Police Department's files will be referred to in this Opinion collectively as the "government's files," based on the holding in *Kyles*, that prosecutors have a duty to learn of any favorable evidence known to others "acting on the government's behalf in this case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Commonwealth v. Gibson*, 951 A.2d 1110, 1127 (Pa. 2008); *Commonwealth v. Burke*, 781 A.2d 1136, 1142 n.5 (Pa. 2001).

testimonial evidence from the hearing and the documents from the hearing as an amendment and supplement to our petition." N.T. 9/25/2012 at 51. This Court granted appellee leave to amend.[22] *Id.* at 77. Thereafter, appellee in fact amended his PCRA petition, filing an Amendment and Supplement to Petition for Post-Conviction Relief on the morning of September 28, 2012, wherein he asserted, among other things, that the Commonwealth presented the jury with "sanitized characterizations of the victims in this case," and argued for relief on the basis of *Cone v. Bell*, 556 U.S. 449 (2009) and *Banks v. Dretke*, 540 U.S. 668 (2004). Subsequent to that filing on September 28, 2012, this Court ruled on appellee's issues, denying all guilt-phase issues but granting relief in the form of a new penalty phase hearing for the reasons discussed below.[23]

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22. *See* Pa.R.Crim.P. 905(a) ("The judge may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.").

23. As a necessary component to the Court's ruling, the Court was constrained to conclude that the trial prosecutor was less than candid when testifying at the September 2012 PCRA evidentiary hearing. Based on her testimony concerning the two cases which she prosecuted against appellee, this Court ultimately concluded that the trial prosecutor engaged in "gamesmanship," knowingly suppressing evidence that she believed was substantially similar to that which led to a compromise verdict in the Hamilton case. Intentionally rooting evidence out of the Norwood prosecution in order to secure a first degree murder conviction and death penalty sentence constitutes "gamesmanship." Some of the credibility determinations that led this Court to that conclusion are delineated and discussed in the body of this Opinion. The Court has also attached an "Appendix," detailing how Ms. Foulkes' testimony

The Court also entered an Order staying appellee's execution.[24]

FACTS

The facts presented at trial substantiating appellee's first degree murder, robbery and criminal conspiracy convictions have been presented in detail by our Supreme Court and by the Third Circuit. *Williams I*, 570 A.2d at 77-79; *Williams*, 637 F.3d at 198-202. The basic facts underlying appellee's conviction for the murder of Amos Norwood are as follows[25]:

On Monday, June 11, 1984, appellee met Draper at Mount Pleasant Avenue and Lincoln Drive to gamble with a few other friends. N.T. 1/22/1986 at 665. After gambling

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before this Court and instances from her prosecution of appellee led to this Court's credibility determinations. The Appendix is explicitly made a part of this Opinion and is incorporated herein by reference.

24. On September 28, 2012, this Court found that the other claims raised by appellee in his March 9, 2012 petition with respect to CP-51-CR-0823621-1984 (Norwood case) were without merit. N.T. 9/28/2012 at 12-13. A notice of appeal regarding those rulings was filed on October 25, 2012, but a docketing number has not yet been assigned for that cross-appeal. A separate opinion regarding that appeal will be filed in due course. This Court did not make any decision with respect to CP-51-CR-0907971-1984 (Hamilton case), as the focus was on the matter in which Governor Corbett had signed an execution warrant which was to be effectuated on October 3, 2012.

25. Draper was the sole Commonwealth witness to testify about the events leading up to Amos Norwood's death.

for close to an hour, the pair ran out of money. *Id.* at 666. Appellee told Draper that "he had an idea that he knew somebody around the corner to get some money from." *Id.* at 667. Appellee explained to Draper that this source of money was a man he knew named Amos, whom he had met at a bar downtown. *Id.* Appellee told Draper that he was "going to try to extort him by telling his wife that he was a homosexual." *Id.* at 667-68. The two walked together towards this man's home; however, before they arrived at their destination, appellee told Draper to wait at the top of the street while appellee entered the home. Draper estimated that he had to wait for 20 minutes before he saw appellee emerge with $10 in hand. *Id.* at 668-69. As Draper asked appellee about the money, a woman walked past them towards the Norwood home; appellee told Draper that woman was Mr. Norwood's wife. Appellee said, "Excuse me, Miss, excuse me, Miss," but the woman did not hear him. *Id.* at 670.

The pair then returned to the corner where they had been gambling. Roughly ten minutes later, appellee stood up and said, "There goes my uncle,"[26] as Mr. Norwood drove past the group. *Id.* at 671. Appellee ran to the car, got in, and drove off with Mr. Norwood on Lincoln Drive. *Id.* They returned a few minutes later, and appellee stepped out of the car. He walked to Draper and told him to get in the car and "play it off like you going home, like

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26. A the PCRA evidentiary hearing before this Court, Ms. Foulkes testified that, from her prosecution of appellee for killing Herbert Hamilton, she understood the term "uncle" to be a term of "familiarity." In the Hamilton trial, Antonio Williams had referred to his older homosexual lover, decedent Herbert Hamilton, as his "uncle." N.T. 9/20/2012 (A.M.) at 16-19.

you want a ride home, and we gonna take some money." *Id.* at 672. Once he sat in the backseat, Draper gave Mr. Norwood "phony directions," directing the car towards a dark street adjacent to a cemetery. Around that time, Draper grabbed Mr. Norwood from his position in the backseat and appellee ordered Mr. Norwood out of the car. *Id.* at 673-74. At appellee's direction, the three men walked towards the edge of the cemetery. Appellee jumped the fence into the cemetery first, followed by Mr. Norwood and then Draper. *Id.* at 674. After walking into the dark, appellee told Mr. Norwood to lay down. Appellee and Draper took Mr. Norwood's clothes off and used them to hogtie him. Mr. Norwood said the pair could just take the money and leave, but appellee refused, ordering Draper to stand with Mr. Norwood while he ran back to the car. Appellee returned with a handful of tools including a socket wrench and a tire iron. Despite Draper's pleading with appellee to leave, appellee "started getting mad" and hit Mr. Norwood with a tire iron. Appellee then ordered Draper to hit Mr. Norwood with the socket wrench. *Id.* at 679-81. Together the pair beat Mr. Norwood until he appeared to be dead, pulled Mr. Norwood's body between two tombstones, and then took Mr. Norwood's car.[27] *Id.* at 682. That night, appellee returned to the cemetery by himself, soaked Mr. Norwood's body in gasoline and set it on fire. *Id.* at 688.

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27. Once they left the cemetery, the two men threw Mr.. Norwood's possessions into a metal trash can in a nearby Pathmark parking lot. The next day, they returned to the trash cans, and fished through them for credit cards or money. After finding Mr. Norwood's credit card and AT&T phone card, the pair went to Atlantic City with a man named Ronald Rucker to try to get money from the credit card. *Id.* at 689-90.

Appendix F

LEGAL ANALYSIS

Petitioner raises the following issues on appeal:

1. Was the lower court without jurisdiction to consider defendant's third PCRA petition where his timeliness exception claims[28] raised a claim known to him years before he filed the petition?

2. Whether the lower court erred in finding that the information allegedly suppressed by the Commonwealth was otherwise unavailable to defendant, would have been helpful to his case and admissible, and met the legal standard for "materiality."[29]

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28. This Court found as valid only one timeliness exception claim – governmental interference. The "claim" that was "raised" by the "timeliness exception claims," which the Commonwealth alleges was known to appellee "years before he filed the petition" is presumably the underlying *Brady* claim upon which this Court found appellee is entitled to relief under 42 Pa.C.S. § 9543(a)(2)(i). As discussed *infra*, appellee did not know of this *Brady* claim – based on withheld evidence of Norwood's sexually inappropriate behavior – "years before he filed the petition."

29. On October 3, 2012, appellant filed both a Notice of Appeal and a Statement of Errors Complained of on Appeal Pursuant to Pa.R.A.P. 1925(b) (Statement of Errors). On October 12, 2012, appellant applied for leave to amend its Statement of Errors and affixed an Amended Statement of Errors, which included the second issue addressed herein. The Court issued an Order on October 15, 2012, formally accepting appellant's Amended Statement of Errors.

Appendix F

Appellee's timeliness exception claim of governmental interference, which this Court found was established and which accorded this Court jurisdiction, did not raise a claim known to appellee for years before he filed the instant petition; appellee actually learned of his claim – a claim of suppressed material evidence which this Court found met all the requirements under *Brady v. Maryland*, 373 U.S. 83 (1963) – during the evidentiary hearing which was ordered in this case.

This Court found that the Commonwealth suppressed multiple pieces of evidence, all of which shared a common feature: each strengthened the inference that Amos Norwood was sexually involved with boys around appellee's age at the time of his murder. The Commonwealth withheld one such statement entirely[30] and turned over to the defense two "sanitized" statements.[31] In those "sanitized"

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30. This was evidenced by Mrs. Foulkes' handwritten note found in the District Attorney's Office's Norwood trial file. Ms. Foulkes had a conversation in which she learned that Ronald House, a 16-year-old boy in Amos Norwood's church, was groped "on privates" by Mr. Norwood, and that there were other "possible incidents." N.T. 9/20/2012 (P.M.) at 120-23. (See Attachment D, marked as Exhibit Court-2 before this Court, page 2). For this Court's discussion of how Ms. Foulkes' pattern of selective non-disclosure amounted to "gamesmanship," see Appendix.

31. This was evidenced by a June 1984 police activity sheet. Mamie Norwood, Amos Norwood's widow, and Reverend Charles Poindexter, Amos Norwood's colleague at St. Luke's Church and friend for almost 30 years, both made statements to police about Mr. Norwood's homosexual involvement with teenage boys in his community. The police activity sheet revealed that Mrs. Norwood

told police about a time in which she awoke at 2 AM to find a "young male, slim," standing silently in the hallway of her home. Mrs. Norwood explained to police that her husband woke her to ask her for money. Mrs. Norwood told police that "at that point" she believed it to be a kidnapping. She watched as her husband loaded some stereo equipment into his car, and then he got in and drove off with the young man. Mrs. Norwood said that her husband returned home around 9-10 AM the next day and told her a "rambling" story about being "abducted," but that he was able to "escape" after using "psychology" on the captors "until they fell asleep." Mrs. Norwood remembered that he pleaded with her not to get the police involved. Additionally, Mrs. Norwood's eldest daughter was present during the interview, "but made no comment on her belief in the veracity of the story." (See Attachment E, marked as Exhibit P-24 before this Court, page 2). In the version of Mamie Norwood's statement that was disclosed to the defense, this entire account was omitted. (See Attachment F, marked as Exhibit C-2 before this Court, item 17). In fact, the only mention of Mr. Norwood driving young males in his car was Mrs. Norwood's statement: "[m]y husband would drive the kids home [from church] who didn't have a ride so a lot of people were in his car ; at times," and that "he would have to know the person very well to pick them up. He never picked up strangers." *Id.*

The same police activity sheet also revealed that Reverend Poindexter told police "in confidence" that Mr. Norwood "may have been a homosexual," and that he had "in fact received a complaint about five years ago from the mother of a 17 year old parishioner that deceased had propositioned the 17 year old for sex, (male)." (See Attachment E, marked as Exhibit P-24 before this Court, page 1). Additionally, the activity sheet noted that Reverend Poindexter "added that deceased had worked with juvenile males in the parish for years, doing counciling [sic] work for disturbed males, and males with family problems." *Id.* In the version of Reverend Poindexter's statement that was disclosed to the defense, all mention of homosexuality was removed. (See Attachment G, marked as Exhibit

statements, direct and indirect evidence of Mr. Norwood's ephebophilia[32] had been omitted, the government interfered with appellee's ability to present the claim that his due process right to a fair trial had been violated. This claim has not been waived, nor previously litigated, as it is based on information discovered in September 2012. The suppression of this evidence, which could have been used to develop *and* pursue an alternate theory at the penalty phase, undermines confidence in the jury's death sentence, thereby constituting a meritorious claim of a constitutional violation under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Cone v. Bell*, 556 U.S. 449 (2009).[33]

C-2 before this Court, item 19). In response to the question by police, "Do you know of any problems Mr. Norwood had in the past?," the statement included an answer about how five years earlier, men "came to [Mr. Norwood's] house, and told his wife, they had him in the car and wanted money." *Id.*

32. "Ephebophilia" is the psychological term for the attraction of adults to adolescents. It derives from the root "ephebe," which means "a young man." Webster's New Encyclopedic Dictionary 610 (2002).

33. This Commonwealth has had the death penalty in effect since its reinstatement in 1978 and, as the law of this Commonwealth, this Court has followed it in presiding over more than a dozen capital cases and in imposing the jury's verdict of death in three of those cases. An integral part of the jurisprudence of the death penalty is that it is for the *jury* to decide whether the defendant and the case before them is more – or less – deserving of the death penalty. *See Commonwealth v. Blount*, 647 A.2d 199, 209 (Pa. 1993) (finding that the process of weighing aggravating and mitigating factors is the "exclusive function of the jury"). Inherent in this determination is that the jury be given the full picture of what the case was about, and

Appendix F

I. Jurisdiction

For this Court to have jurisdiction to grant appellee's PCRA petition, the petition must have been filed within one year of the date that the judgment became final, or appellee must prove one of the three timeliness exceptions delineated in 42 Pa.C.S. §§ 9545(b)(1)(i)-(iii). *See* 42 Pa.C.S. § 9545(b)(1). Given that the judgment against appellee became final decades ago, jurisdiction would not exist without appellee satisfying a timeliness exception. Additionally, the instant petition had to be filed within 60 days of the date that it could have first been presented. 42 Pa.C.S. § 9545(b)(2). Our Supreme Court has indicated that the 60-day rule requires appellee to "explain why, with the exercise of due diligence, the claim could not have been filed earlier." *Commonwealth v. Marshall*, 947 A.2d 714, 720 (Pa. 2008), *citing Commonwealth v. Breakiron*, 781 A.2d 94, 98 (Pa. 2001).

(1) 42 Pa.C.S. § 9545(b)(1)

In this case, the Court concluded that appellee satisfied the first timeliness exception, "governmental interference." "Although a *Brady* violation may fall within the governmental interference exception, the petitioner must plead and prove the failure to previously raise

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what may have prompted the defendant's unlawful actions – including behavior of the victim as it relates to the circumstances of the offense and of the defendant. By withholding from the jury the full picture in the instant case, the trial prosecutor elected to put herself in the role of controlling what the jury's verdict should be, thereby usurping the jury's unique role in the determination of the penalty.

the claim was the result of interference by government officials, and the information could not have been obtained earlier with the exercise of due diligence." *Commonwealth v. Abu-Jamal*, 941 A.2d 1263, 1268 (Pa. 2008), *citing Breakiron*, 781 A.2d at 98 (combining the requirements of § 9545(b)(1)(i) and § 9545(b)(2)). When a claim of governmental interference is rooted in the Commonwealth's failure to produce exculpatory evidence, appellee bears the burden to "identify a specific claim that he was unable to discover or develop due to the District Attorney's conduct." *Commonwealth v. Howard*, 788 A.2d 351, 355 (Pa. 2002), *citing Commonwealth v. Yarris*, 731 A.2d 581, 588 (Pa. 1999). In *Howard*, the petitioner could not demonstrate governmental interference because he failed to "explain how the District Attorney's conduct hobbled his development or prevented his discovery of any particular claim." *Howard*, 788 A.2d at 355. Likewise in *Commonwealth v. Stokes*, the petitioner was aware of potentially exculpatory information in files maintained by the United States Postal Service and the Philadelphia Police Department for years before he sought them, and he "never asserted that the prosecution (or anyone else) prevented him from gaining access to these files in the 12 years between the date his direct appeal was decided and the date he ultimately sought the files." 959 A.2d 306, 310 (Pa. 2008). Accordingly, Stokes' governmental interference claim was fatally flawed. *Id.* at 311.

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In the instant matter, this Court found that appellee met its burden of identifying a specific claim he was unable to discover or develop due to the government's conduct. This Court found that the government interfered with appellee's presentation of a claim under *Brady* in two ways. First, the act of removing pertinent information from a statement, and providing a "sanitized" version, which purports to be the entirety of the statement, is interference in and of itself. The government's sanitization of Mamie Norwood's and Reverend Charles Poindexter's statements, and flat non-disclosure of information about Amos Norwood's sexual advances on Ronald House, interfered with appellee and his attorney learning that Mr. Norwood had engaged in sexually inappropriate behavior with teenage boys other than appellee. By scrubbing these statements of references to Mr. Norwood's sexual improprieties and then providing the "clean" versions, the government created the false impression that appellee was given the full account of what these witnesses stated. That false impression "hobbled" appellee's ability to "discover or develop" a *Brady* claim rooted in information removed from the scrubbed statements. That false impression was maintained by the Commonwealth until the original statements were found – in the government's files and some in the very handwriting of the trial prosecutor.

Second, throughout the litigation of this case, the government has disputed the existence of information in their files about Amos Norwood's homosexual ephebophilia, thus further interfering with appellee learning the facts that form the basis of the instant *Brady* claim. In *Stokes*, our Supreme Court affirmed the PCRA Court's determination that there had been

no governmental interference, as the petitioner was aware of the existence of information in the files of the United States Postal Service and the Philadelphia Police Department for years. *Stokes*, 959 A.2d at 310. In fact, the trial prosecutor in that case maintained an "open file" policy, which highlighted how the *government* had given the petitioner access to relevant information. *Id.* at 311. The government's behavior in this case is notably different. Here, the government has continually denied the existence of exculpatory evidence.

At the 1998 evidentiary hearing regarding appellee's 1995 PCRA petition, the government intervened as appellee attempted to put forth evidence that Amos Norwood had been sexually abusive towards young boys, including appellee. When appellee proffered that evidence, Judge Savitt looked to the Commonwealth for clarification, asking directly: "there is nothing in the case involving Norwood's homosexuality or violation of young boys[?]" N.T. 4/8/1998 at 237. The Commonwealth responded to Judge Savitt's question, "Oh, no, just that he knew about Norwood's behavior and was trying to extort

money[34] from it."[35] *Id.* Precisely the evidence that Judge Savitt asked for was sitting in the government's files.

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34. The "extortion" plot referenced by the Commonwealth in response to Judge Savitt's question is different from the evidence that the government suppressed. In his July 20, 1984 statement to police and again at trial in the Norwood case, Draper said that appellee suggested that the two men "extort" Mr. Norwood by telling his wife that he was gay. See Attachment O, which was marked as Exhibit P-2 in the PCRA hearing before this Court; N.T. 1/22/1986 at 667-68. Ms. Foulkes referenced this in her opening statement. N.T. 1/14/1986 at 44. Draper's testimony that appellee said he might exploit his knowledge of Mr. Norwood's sexual *orientation* is critically different from evidence that Mr. Norwood molested and/or attempted to molest teenage boys.

35. The record of this discussion reflects that Judge Savitt and ADA, Silverstein were talking at the same time towards the tail end of Judge Savitt's question about Norwood's violation of young boys.

> THE COURT: But there is nothing in the case involving Norwood's homosexuality or violation of young boys –
>
> ADA SILVERSTEIN: Well, that was the secret.
>
> THE COURT: – that accrued that was involved.
>
> ADA SILVERSTEIN: Oh, no, just that he knew about Norwood's behavior and was trying to extort money from it. It didn't work so it moved on to robbery and murder, so it was not a secret. It was not a secret to anyone at that time.

N.T. 4/8/1998 at 235–37.

The only reasonable way to read the back-and-forth is that when ADA Silverstein responded, "Oh no, just that he knew about Norwood's behavior and was trying to extort money from it," that he was responding to Judge Savitt's question.

Without that evidence, the Court forcefully attacked the relevance of testimony proffered by the defense as to any potential sexual impropriety in Norwood's past. Based on the Commonwealth's affirmative misrepresentation[36] that there was nothing else in the case involving Norwood's "homosexuality or violation of young boys," Judge Savitt prevented both lay witnesses and expert witnesses from developing that issue. *Id.* at 158-59, 181-82; N.T. 4/9/1998 at 360-61; N.T. 4/13/1998 at 597-605.

There is nothing in the text of § 9545(b)(1)(i) requiring that the Commonwealth *maliciously* interfere in the presentation of a claim. Our Supreme Court has long held that the statutory language of the PCRA must be "strictly adhered to." *Commonwealth v. Pursell*, 724 A.2d 293, 303 (Pa. 1999). The plain language of § 9545(b)(1) requires only that "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution." Therefore, the PCRA prosecutor's state of mind when representing to the Court that there was

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36. As discussed *infra*, the trial prosecutor is charged with a duty to "learn of" what exculpatory evidence is in the police files. *Kyles*, 514 U.S. at 437; *Gibson*, 951 A.2d at 1127; *Burke*, 781 A.2d at 1142 n.5. The PCRA prosecutor was specifically questioned by the Court as to whether exculpatory evidence was in "the case." As per the dictates of *Kyles* and its progeny, "the case" encompasses both the District Attorney's Office and police files. The prosecutor's manner of response implied that he had gone through all pertinent files in the case and found nothing. In fact, the information that he stated did not exist was in the government's files and obviously had not been turned over.

nothing in this case about the victim's violation of young boys is not dispositive. Based on the statement of the Commonwealth, Judge Savitt stated that he would "not consider [Mr. Norwood's desire to have sex with kids] as a fact unless on the – on this bare assertion. Now, you should understand that. There would have to be evidence of it and, in other words, what was seen, when it was seen, who was present, who was involved."[37] N.T. 4/13/1998 at 602. Having removed such evidence from the case prior to trial, the government's continuing assertion that no such evidence existed amounted to continuing governmental interference from the time of trial until the government's files were ordered to be opened in September 2012.[38]

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37. This Court does not disagree that bare assertions are insufficient. However, the evidence uncovered in the government's files possesses the necessary degree of specificity.

38. As there is – and was – a close working relationship between the District Attorney's Office's Homicide Unit and the Philadelphia Police Department Homicide Unit, the Assistant District Attorneys assigned to this case could have reviewed the contents of the Police Department's files at any time. Yet as late as the September 14, 2012 hearing before this Court, ADA Ronald Eisenberg himself made a statement which was not entirely true about the scope of the evidence: "[Y]es, there was one piece of a homosexual element to the case. The defendant said he could extort money from Norwood by threatening to reveal that he was gay. That's what he [Draper] said starting from the first time he ever spoke to police about this case." N.T. 9/14/2012 at 57. In addition to the note about Ronald House's sexual abuse as discussed *supra*, there were in fact multiple handwritten notes by Ms. Foulkes referencing homosexuality. On a note titled "*Ask Marc*," Ms. Foulkes wrote, "What motivates Terry? Money, self, betrayal, homosex." (See Attachment H, which was marked as P-5 in the PCRA hearing before this Court). In a note found in the Hamilton trial box

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(2) 42 Pa.C.S. § 9545(b)(2)

In its Statement of Errors, the Commonwealth argues that appellee's "timeliness exception claims raised a claim known to him years before he filed the petition." In order to answer the Commonwealth's claim of error, this Court must identify when appellee's timeliness exception claim became known to him. Appellee could not have known that the government interfered with the presentation of evidence about Amos Norwood's homosexual ephebophilia until such evidence was uncovered. It became clear for the first time in September 2012 that the Commonwealth made incomplete disclosures to defense counsel at the time of trial, and that the government's representations to the 1998 PCRA Court were, in fact, misrepresentations.[39]

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titled "prep – M. Draper 12-20-84 PAB," Ms. Foulkes wrote "knew that Terry made $ by going to bed w/men." (See Attachment I, which was marked as P-8 in the PCRA hearing before this Court). And on another note titled "*Marc Draper* 12-27-85," Ms. Foulkes jotted down the sequence of events from the Norwood killing, and included the following details: "did he [Mr. Norwood] know Terry – liked boys." On the next page, Ms. Foulkes wrote, "did he like boys," and below that "how long had he known Terry." (See Attachment J, which was marked as P-9 in the PCRA hearing before this Court). Lastly, on another note Ms. Foulkes made a more general, though cryptic, reference about the state of the case: "continued investig for faggot squad." N.T. 9/20/2012 (A.M.) at 37-40.

39. The United States Supreme Court's opinion in *Banks v. Dretke*, 540 U.S. 668, 698 (2004) offered persuasive guidance to this Court about the impact of government misrepresentations regarding the existence of evidence on whether a defendant can fairly be considered not diligent for pursuing such evidence.

> In summary, Banks's prosecutors represented at trial and in state postconviction proceedings that

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Within 60 days of the date that the instant *Brady* claim first could have been presented, appellee flied his September 28, 2012 amendment to his PCRA petition, wherein he explained "why, with the exercise of due diligence, the claim could not have been filed earlier," thereby satisfying the second "jurisdictional" requirement. 42 Pa.C.S. § 9545(b)(2); *Marshall*, 947 A.2d at 720, *citing Breakiron*, 781 A.2d at 98.

For a court to have jurisdiction over a PCRA petition filed more than one year after the date the judgment became final, both § 9545(b)(1) and § 9545(b)(2) mandate that the petitioner explain the delay in raising "the claim."[40] In a *Brady* case, this claim-centric perspective means that appellee must set forth "when and how he discovered the Brady material that the Commonwealth allegedly withheld from him." *Breakiron*, 781 A.2d at 98. Likewise, in *Commonwealth v. Hawkins*, our Supreme Court analyzed the jurisdictional requirements of § 9545 in the context of a *Brady* claim by asking when "the facts

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the State had held nothing back. Moreover, in state postconviction court, the State's pleading denied that Farr was an informant. It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutors' submissions as truthful. Accordingly, Banks has shown cause for failing to present evidence in state court capable of substantiating his Farr *Brady* claim.

40. 42 Pa.C.S. § 9545(b)(1)(i) requires that "the failure to raise the claim was the result of interference by government officials ...." (Emphasis added). 42 Pa.C.S. § 9545(b)(2) requires that "[a]ny petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented." (Emphasis added).

upon which [the appellant's] *Brady* claim is based were first revealed," and whether "due diligence would not have revealed them before that time." 953 A.2d 1248, 1253 (Pa. 2008).

In the instant matter, the facts substantiating appellee's *Brady* claim were first discovered in September 2012. Appellee's due diligence would not have revealed that prior to the PCRA hearing before this Court.[41] Based in part on Draper's January 9, 2012 declaration that he had

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41. Appellee's September 6, 2012 discovery request for exculpatory information about Norwood's sexual relationships with children under the age of 18 was based on statements made by Reverend Charles Poindexter and Ronald House to appellee's counsel in early 2012. *Appendix to Petition for Post-Conviction Relief*, 7/16/2012, items 10 and 11 respectively. At that time, Reverend Poindexter stated that Norwood "seemed to have lots of close relationships with young men, most of whom I didn't know. We began to suspect that Amos was having inappropriate relationships with young men." *Id.* at item 10, paragraph 6. Reverend Poindexter also stated that "the mother of a 15-year old boy" told him "that while Amos was driving her son home from a youth group event, Amos touch [sic] her son's genitals. She also told me that Amos had inappropriately touched a number of other boys at the church." *Id.* at item 10, paragraph 15. Reverend Poindexter identified Ronald House as a victim of Norwood's sexual advances. *Affidavits of Jennifer Givens and Eric Montroy*, 9/27/2012 at 2 (See Attachment K). On the basis of that statement of Reverend Poindexter, appellee's attorneys interviewed Mr. House, who said that Mr. Norwood propositioned him for sex when he was 17, and had done the same thing to a friend of his named Bernard. *Appendix to Petition for Post-Conviction Relief*, 7/16/2012, item 11, paragraphs 4-6.

Appellee's attorneys went to speak with Reverend Poindexter on January 12-13, 2012 after having spoken with Draper on January 9, 2012. On that date, Draper stated that he had told detectives during trial prep sessions that:

> Norwood was a homosexual and that he was in a relationship with Terry and that that is what this case was really about. They did not want to hear that. They wanted the motive to be a robbery and kept coming back to that. That's how they wanted me to testify, that it was a robbery.

Declaration of Marc Draper, 1/9/2012 at 4. (See Attachment A, which is pages 11-17 of Exhibit P-16 in the PCRA hearing before this Court).

After Draper "disclosed for the first time the information stated in paragraphs 4 [quoted above} and 7," appellee's attorneys "looked into potential witnesses who might know something confirming the new disclosures by Mr. Draper." *Affidavits of Jennifer Givens and Eric Montroy*, 9/27/2012 at 2 (See Attachment K).

> We reviewed the 6/22/84 police report (with a statement from Reverend Poindexter) provided by the Commonwealth in discovery to Mr. Panarella, which included this comment from Reverend Poindexter: "Several years ago, within the last 5 years, he [Mr. Norwood] was abducted and the men came to the house, and told his wife they had him in the car and wanted money."

Id.

Draper's January 9, 2012 declaration cast Reverend Poindexter's June 22, 1984 statement in an entirely new light. Draper's allegations that the police pushed him to re-shape a story about a sexual relationship gone wrong and to call it a "robbery" would lead a diligent attorney to take a second look at any other possible instances in which witnesses had told police about prior "robberies" involving Amos Norwood. The reference to Norwood's prior robbery in the disclosed version of Reverend Poindexter's June 22, 1984 statement sounds bizarre at first blush. But when viewed

been pressured to testify that appellee's motive for the crime was to rob the victim, and not to go into detail about their homosexual relationship, appellee filed the instant PCRA petition on March 9, 2012. This Court found that appellee's claim had arguable merit and, if sufficiently proved at an evidentiary hearing, potentially satisfied the requirements of § 9545(b)(2).[42] At the evidentiary hearing,

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through the lens of Draper's January 9, 2012 declaration – that "robbery" was the brush used to sweep homosexual impropriety under the rug – Reverend Poindexter's statement called for follow-up. And though that follow-up led to Reverend Poindexter saying there was much more to Amos Norwood and led to Ronald House detailing his experience with Mr. Norwood, it did not lead to knowledge that the government had had this information all along. That only came about after this Court ordered the District Attorney's and Police Department's files opened.

And, as it turned out, it was shown that the government had removed references to Mr. Norwood's homosexual ephebophilia from Reverend Poindexter's statement, and from Mamie Norwood's, thereby making it seem that Mr. Norwood was just a kind church volunteer who had been the victim of a – bizarre robbery years earlier.

42. In *Morris II*, our Supreme Court noted that, when deciding whether a stay of execution is appropriate, jurisdictional questions "should be well fleshed out in advance and we believe that issues related to timeliness should be relatively easy to dispose of by the time they reach this court." *Commonwealth v. Morris*, 822 A.2d 684, 692 (Pa. 2003) ("Morris II") (emphasis added). In *Morris II*, the appellant asserted that he was entitled to an evidentiary hearing regarding witness compensation for testimony as part of a claim of governmental interference. Our Supreme Court rejected the appellant's claim because it was "speculative ... in the absence of any allegations tying the witnesses in a particular case to the District

appellee discovered exculpatory evidence that had been in the government's files since the time of trial and had never before been turned over to the defense. After the hearing, appellee requested leave to amend his March 9, 2012 PCRA petition to include a more nuanced *Brady* claim focused on the evidence uncovered. N.T. 9/25/2012 at 51. That request was granted, and on September 28, 2012, appellee flied an Amendment and Supplement to Petition for Post-Conviction Relief. Therein, appellee argued that he was entitled to relief based on information that came to light for the first time in September 2012 – namely that the government withheld multiple statements from trial counsel, all of which strengthened the inference that Amos Norwood was sexually inappropriate with a number of teenage boys in his community.

This latter claim could not have been filed earlier with the exercise of due diligence because appellee was unable to gain access to the government's trial files until this Court granted an evidentiary hearing on September 14, 2012. In fact, appellee was duly diligent in pursuing this evidence. Appellee attempted to elicit testimony at the 1998 PCRA hearing about the victim's homosexual ephebophilia

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Attorney's policy of paying for their services." *Id.* at 699. Unlike the situation in *Morris II*, appellee's governmental interference claim as set forth in his March 9, 2012 petition and July 27, 2012 Amended Petition was based on averments which, if believed, would have constituted a sufficient basis upon which jurisdiction could have been rooted. This Court found that Appellee's claim regarding the government's undue pressure on Draper created a "material issue of fact," and thus required an evidentiary hearing pursuant to Pa.R.Crim.P. 908(A)(2).

through fact witnesses James Villareal and Donald Fisher. N.T. 4/8/1998 at 229; N.T. 4/13/1998 at 597-605. However, appellee was stifled in his presentation of that evidence by the Commonwealth's steadfast representation that there was no such evidence, and Judge Savitt's consequent limitation on the 1998 PCRA proceedings. From the time that Judge Savitt denied relief until the Third Circuit denied appellee's habeas corpus claims, the litigation had lasted for approximately 16 years. By the time the Third Circuit ruled, appellee had almost no avenue left and execution became a real possibility.

Nevertheless, the defense was still actively involved in its representation of appellee. The defense prepared a petition for a writ of *certiorari*, which it filed in the United States Supreme Court on December 13, 2011. While awaiting a decision from that Court, appellee's counsel approached Draper to see if the possibility of appellee's potential nearing execution would finally prompt him to speak with them.

Dating back to the time of trial, Draper had refused to speak with appellee's attorneys.[43] Appellee's attorneys again tried to speak with Draper on an occasion when he was at SCI-Graterford, which was from 1995-2006. N.T. 9/24/2012 (A.M.) at 35. Draper testified that he did not speak with appellee's representatives because, "I didn't want to speak on anything to anybody." N.T. 9/20/2012 (P.M.) at 210. Draper cited fear that the police would still charge him with the murder of Donna Friedman, as well

43. Mr. Panarella testified at the post-trial motions hearing, "Mr. Draper would not discuss the case with my associate." N.T. 4/24/1987 at 7.

as feelings of anger at himself as reasons for his self-imposed silence. *Id.* at 208; 211. This Court found Draper's explanations for having refused to communicate credible and therefore accepted them.

Thus, when appellee's attorneys visited Draper at SCI-Frackville in January 2012 as a "last ditch attempt," and told him that appellee was "about to be put to death," Draper decided to break his silence. *Id.* at 215. While testifying before this Court, Draper broke down crying, stating that "nobody wants to know that you a transformed person [sic]. Nobody wants to know that what type of person you are now from when you was 18 [sic]. I'm 46 now." *Id.* at 216. This Court found credible Draper's reasoning for finally speaking up. It made sense. He talked about how maturity and his "relationship with the Lord" motivated him to speak because "if I call myself a Christian, right, and I live by faith, not by sight, and God loved me so much, then, you know, he blessed me so much that, you know, I have to share that blessing and I wouldn't want to see anybody put to death." *Id.*

"Diligence" is defined as "[a] continual effort to accomplish something"; "care; caution; the attention and care required from a person in a given situation."[44] *Black's Law Dictionary* (9th ed., 2009) ("diligence"). Considering appellee's "situation" as part of the "due diligence" calculation, this Court found it significant that there were a number of instances in which Draper rebuffed

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44. *Black's Law Dictionary* defines "due diligence" by referring to its entry for "diligence." *Black's Law Dictionary*, (9th ed., 2009) ("due diligence").

appellee's attorneys when they had sought to speak with him.[45] Additionally, even after the Third Circuit denied his habeas corpus petition in March 2011, appellee's counsel were busy pursuing relief on his ineffective assistance of counsel claim with the United States Supreme Court. Instead of waiting for the High Court to grant or deny *certiorari*, or for Governor Corbett to sign his execution warrant, appellee took action reasonably quickly after March 2011, to ensure that no stone had been left unturned.

As a result of Draper's two declarations, appellee filed the March 9, 2012 PCRA petition, which led to this Court's decision to grant an evidentiary hearing, to the discovery of the exculpatory documents, and thus ultimately to the underlying substantive *Brady* claim.

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45. In the context of Pa.R.Crim.P. 600 – the speedy trial rule – our courts have emphasized that due diligence must be determined on a case-by-case basis. "Due diligence does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a **reasonable effort** has been put forth." *Commonwealth v. Hill*, 736 A.2d 578, 588 (Pa. 1999) (emphasis added). A "punctilious care" standard would require that an individual renew efforts having been rebuffed multiple times. However, a "reasonable effort" standard allows for reliance on a representation that the evidence sought cannot be obtained.

This claim satisfies the 60-day provision of § 9545(b)(2), as it was formally flied from three to six days after the first date on which it could have been presented.[46] The evidence substantiating the current claim comes from the District Attorney's Office's flies and the Philadelphia Police Department's flies, which were opened on September 22, 2012 and September 25, 2012, respectively. Appellee then filed the Amendment and Supplement to his PCRA petition on September 28, 2012. Accordingly, this Court found that it had jurisdiction under §§ 9545(b)(1) and (2).

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46. The Commonwealth argued that appellee should not be permitted to amend his PCRA petition to conform to the evidence produced at the evidentiary hearing because the documents uncovered during the evidentiary hearing did not constitute a meritorious *Brady* claim. N.T. 9/25/2012 at 61. This Court was cognizant of the significant interests that the Commonwealth had, and continues to have in this case as regards finality. These are also strong interests in the justice system as a whole and were noted by our Supreme Court in *Morris II*, as noted in FN 42, *supra*. However, on balance, this Court found that appellee was entitled to amend pursuant to Pa.R.Crim.P. 905(a). Appellee's request to amend his petition, which was granted and constituted the basis for appellee's subsequent "Amendment and Supplement," distinguishes the procedural posture of this case from *Commonwealth v. Porter*, 35 A.3d 4 (Pa. 2012).

Appendix F

II. Not Previously Litigated; Not Waived

Appellee's claim is not "waived" under § 9544(b). A claim of error is waived if a party could have raised the issue at trial, on appeal, or in a prior post conviction proceeding but failed to do so. *Commonwealth v. Peterkin*, 649 A.2d 121, 124 (Pa. 1994). There was no prior proceeding in which appellee could have raised the claim that the government suppressed evidence that Draper had been pressured to call the crime a robbery-gone-wrong, or the claim that the government suppressed evidence of the victim's homosexual ephebophilia, as the latter evidence was uncovered in September 2012.

Nor is appellee's claim "previously litigated" under § 9544(a). A claim of error is "previously litigated" when either the "highest appellate court in which the appellee could have had review as a matter of right has ruled on the merits of the issue," or "it has been raised and decided in a proceeding collaterally attacking the conviction or sentence." 42 Pa.C.S. §§ 9544(a)(2), (3). None of the claims raised by appellee in his 1995 PCRA petition was based on the prosecution having suppressed Draper's statement to the government or evidence of the victim's homosexual proclivities towards teenage boys. Not until appellee amended his March 9, 2012 PCRA petition in light of the September 2012 evidentiary hearing has he raised the specific claim upon which relief was granted. Additionally, it would be impossible for a court to have ruled on the merits of appellee's current *Brady* claim, given that the evidence found in the government's files was uncovered in September 2012. The "merits" of the current issue revolve

around whether or not the three prongs of *Brady* have been met, whereas the "merits" of the issues discussed in appellee's prior PCRA petition revolved around whether or not trial counsel was constitutionally ineffective.

Additionally, the nondisclosure of evidence- and the affirmative misrepresentation by the Commonwealth that such evidence did not exist, as noted *supra*- ensured that the issues about Amos Norwood's homosexual impropriety with boys was not "previously litigated."

III. Success on the Merits

Appellee demonstrated that the government "sanitized" the statements of two witnesses, Mamie Norwood and Reverend Charles Poindexter, removing information that either directly or indirectly demonstrated that the victim was a homosexual ephebophile. N.T. 9/25/2012 at 10-20; 39-40. Additionally, the prosecutor failed to disclose to defense counsel evidence in her possession, as well as in the Philadelphia Police Department's file, that the victim had made sexual advances on a teenage member of his church, and that there were other possible instances of sexual impropriety. N.T. 9/20/2012 (P.M.) at 121-24. With the suppressed evidence in hand, reasonable trial counsel could have pursued an alternate theory at the penalty phase, rooted in evidence that would have been admissible during the guilt phase and bolstered during the penalty phase of trial. At the guilt phase, both Mamie Norwood and Reverend Poindexter testified that Amos Norwood was a kind church volunteer who spent his time helping underprivileged children. N.T. 1/14/1986 at 157-58; 166-

67; 172-74. The information that each had previously provided to the government could have been used on cross-examination to directly contradict *their* characterizations of Mr. Norwood. And, at the penalty phase, a reasonable defense attorney could have called a witness like Ronald House to testify about his experience as a sexual target of Amos Norwood. Based on that evidence, reasonable trial counsel could have credibly argued that appellee was another one of Mr. Norwood's teenage sexual targets, ultimately bolstering appellee's case in mitigation and undermining confidence in the jury's death sentence. Without this evidence, appellee's counsel was given a skewed and incomplete picture of the victim which effectively tied his hands while the prosecution elicited testimony at trial about his kind and caring character, and then argued to the jury at the penalty phase that the victim's "kind" and "innocent" nature should be considered against appellee when determining whether to sentence him to death. This Court concluded that, if disclosed, the cumulative impact of this evidence would have enabled reasonable trial counsel to challenge, if not entirely to preclude, the government's sympathetic portrayal of the victim, while also explaining how Norwood's sexual advances amounted to a mitigating "circumstance of the offense" under 42 Pa.C.S. § 9711 (e)(8).

Preliminarily, it is important to note that for evidence to qualify as *Brady* material, it must "involve the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *U.S. v. Agurs*, 427 U.S. 97, 103 (1976). Prosecutors do not have to disclose apparently exculpatory evidence "where

the parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence." *Commonwealth v. Morris*, 822 A.2d 684, 696 (Pa. 2003), *citing Commonwealth v. Paddy*, 800 A.2d 294, 305 (Pa. 2002). The "defense diligence" requirement of *Brady* has been addressed numerous times by the courts of our Commonwealth. *See, e.g., Pursell*, 724 A.2d at 305; *Paddy*, 800 A.2d at 305; *Commonwealth v. Johnson*, 863 A.2d 423, 426 (Pa. 2004); *Commonwealth v. Crews*, 863 A.2d 498, 502 (Pa. 2004). Throughout these cases, our Supreme Court has limited the prosecutor's duty under *Brady*, finding that prosecutors need not disclose "evidence" or "information" in the government's possession that the defendant knew or could have known. *See, e.g., Johnson*, 863 A.2d at 426 ("No Brady violation where the Appellant knew or could have uncovered the evidence at issue with reasonable diligence."). But that limitation is itself limited; when determining whether the defendant knew or could have known of the suppressed evidence, our courts focus on the *specific evidence* that the defendant claims has been suppressed, not on how that evidence would have been used at trial. When that evidence is either known or knowable to the defense, there is no *Brady* violation. *Paddy*, 800 A.2d at 305.

In *Johnson*, the defendant claimed that an affidavit written and signed by George Robles, a Commonwealth witness, was suppressed. The defendant argued that, as a result, impeachment evidence about Robles being a drug dealer who colluded with police was withheld. *Johnson*, 863 A.2d at 425. The defendant highlighted six aspects of Robles's affidavit as constituting *Brady* material. Our

Supreme Court's response was narrowly tailored to each aspect of Robles's affidavit, and whether or not the defendant knew of that specific information at the time of trial. *Id.* at 426-27. Because the Court determined that the defendant either was aware, or could have become aware with reasonable due diligence, of the individual pieces of evidence/information, the *Brady* claim failed.

In *Paddy*, the defendant argued that, as part of an unrelated murder, police were investigating a suspect who had been described in the same unique way as the suspect in the case for which Paddy was charged with murder. Paddy argued that information should have been disclosed prior to trial. *Paddy*, 800 A.2d at 304. Our Supreme Court held that "the information allegedly withheld from the defense was published in Philadelphia's two major newspapers, the Philadelphia Inquirer and the Philadelphia Daily News, months before Paddy's second trial." *Id.* at 305. The fact that the evidence of this investigation was publicly available meant that it could not form the foundation of a *Brady* claim.

In *Crews*, the defendant claimed that the government withheld information about his own military records and his family background, history of mental illness and substance abuse. Our Supreme Court again focused on the precise evidence that the defendant claimed should have been turned over. "There is no nothing which demonstrates appellant could not have supplied his family background information and military records himself ... [N]one of the information he cites was uniquely within the control of the prosecution." *Crews*, 863 A.2d at 502.

But where the suppressed evidence is unknown, even if it is part of a larger "theory" that includes evidence that *is* known to the defense, there may still be a *Brady* violation when the government suppresses that unknown evidence. *Kyles*, 514 U.S. at 429, 447-48. In *Kyles*, the defendant knew that the key Commonwealth witness, Beanie, planted incriminating evidence in his garbage. *Id.* at 429. Nevertheless, the United States Supreme Court held that an internal police memorandum calling for the seizure of Kyles' garbage based upon Beanie's suggestion was *Brady* material. *Id.* at 447-48. In other words, there was an additional "aspect" or "layer" to the evidence, about which the defendant did not know. Because that additional component to the evidence would have helped to round out a "theory" favorable to the defendant, the Supreme Court found that it was one piece of suppressed evidence which, along with others, cumulatively undermined confidence in the outcome at trial. *Id.* at 448.

In *Cone*, the Supreme Court held that evidence crediting and corroborating a defense theory could be the additional "aspect" or "layer" to the evidence about which the defendant did not know, and which the government had suppressed. *Cone*, 556 U.S. at 470-71. Mr. Cone knew that he was under the influence of drugs and alcohol when he went on a crime spree. *Id.* at 474. However, he did not know that witnesses who had seen him several days before and after the murders described him to the police as "wild eyed" and that his behavior was "real weird." *Id.* at 459. The United States Supreme Court found that the suppressed statements "strengthen[ing] the inference" that Cone was impaired at the time of the crime could

have amounted to a viable *Brady* claim so long as it was ultimately considered "material."[47] *Id.* at 475.

The Third Circuit recently applied that logic of *Kyles* and *Cone* in *Simmons v. Beard*, holding that, where suppressed evidence constitutes a crucial part of a larger "theory," the non-disclosure of *that* evidence can constitute a viable *Brady* claim. *See Simmons v. Beard*, 590 F.3d 223, 238 (3d Cir. 2009) ("Without the evidence suppressed by the prosecution, however, the defense could not credibly proffer such a theory. Had this information been available to the defense before trial, it could have much more effectively attacked the Commonwealth's case ..."). Our Supreme Court also recently endorsed the principle that suppressed evidence comprising part of a defense theory – whether that theory has been pursued *or* could *potentially* have been pursued – can substantiate a *Brady* claim, as long as that evidence is ultimately "material." *Commonwealth v. Ly*, 980 A.2d 61, 75 (Pa. 2009) ([T]he protection of *Brady* extends to the defendant's ability to investigate alternate defense theories and to formulate trial strategy.").

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47. The case was before the United States Supreme Court on a petition for a federal writ of habeas corpus after Mr. Cone had filed two unsuccessful state petitions for post-conviction relief. *Cone*, 556 U.S. at 461. The issue before the Supreme Court was whether a federal habeas claim is "procedurally defaulted" when it is twice presented to the state courts. After determining that the State's procedural objections "provide no obstacle to judicial review," the Court turned to the merits of the *Brady* claim. *Id.* at 469. Ultimately, the Court remanded the case to the District Court "with instructions to give full consideration to the merits of Cone's *Brady* claim." *Id.* at 476.

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In *Ly*, three men who identified themselves as "gangsters" demanded that a restaurant owner in Philadelphia's Chinatown pay "protection money." *Id.* at 66. Soon after corralling three restaurant employees in the kitchen, one worker – Janice Wong (Janice) escaped out of a side door. The three gangsters ran after her, and eventually the person she called "Second Man" grabbed her arm and turned her to face him in a well-lit street corner. *Id.* The three men returned Janice to the restaurant, where they found Jade Wong (Jade) on the phone with police. After taking several steps toward the dining area, Janice heard a gunshot, saw Jade bleeding from her head, and then saw Second Man backing out of the side door in the area she believed the shooter would have been. *Id.* Shortly after the murder, Janice identified Ah Thank Lee as the person she had labeled "First Man." Nearly two years later, on the same day that Janice identified Cam Ly (the appellant) as Second Man, she identified Wong Kin Fung, not Ah Thank Lee, as First Man. *Id.* at 66-67. The Commonwealth failed to disclose to Mr. Ly that Janice had made an inconsistent identification with respect to First Man. Our Supreme Court held that the government "improperly withheld" the conflicting identification because it could have substantiated an alternate defense theory for Mr. Ly: "it could have been used to question Janice Wong's identification of Appellant as the shooter, especially given the prosecution's attempt to bolster Janice Wong's identification of Appellant with her identification of Ah Thank Lee." *Id.* at 78. The *Ly* Court ultimately concluded that the non-disclosure of Janice's conflicting identifications of First Man did not prejudice Mr. Ly because the other evidence against him was quite

strong; she had seen him in a well-lit street corner and never wavered in her identification of him. *Id.* Under *Ly*, evidence substantiating an "alternate defense theory" may properly be considered the foundation of a *Brady* claim, so long as that withheld evidence is "material."[48]

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48. In *Commonwealth v. Willis*, 46 A.3d 648 (Pa. 2012), Madame Justice Todd's Opinion Announcing the Judgment of the Court ("OAJC") discussed the principle in *Ly* that "Brady applies not only to purely exculpatory evidence or to evidence which relates to the credibility of witnesses, but also to evidence which impacts a defendant's ability to investigate alternate defense theories and to formulate trial strategy," and stated that it extends to cover both admissible and inadmissible evidence. *Id.* at 669-70, *citing Ly*, 980 A.2d at 76. To support the notion that *Brady* applies to inadmissible evidence, Madame Justice Todd cited to *Commonwealth v. Green*, 640 A.2d 1242 (Pa. 1994). Mr. Chief Justice Castille wrote a forceful concurring opinion, disagreeing with the OAJC's reliance on *Green*, instead arguing *Green* was wrongly decided, as it was based entirely on speculation:

> Here is the Green Court's dispositive analysis: "knowledge of [the undisclosed, inadmissible evidence] certainly would have opened another avenue of investigation for the defense that may well have led to further exculpatory evidence. Had the defense been aware of Moser's statements, it may also have altered its trial strategy, especially in regards to appellant's decision not to testify ...." There are no specifics in these "may haves." It is simply speculation upon speculation. No specific evidence is identified.

Willis, 46 A.3d 683 (Castille, C.J., concurring).

The Chief Justice then suggested that instead of allowing *Brady* material to include that which has a "possible effect[] upon 'defense preparation," he "would require that the derivative, admissible

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Whereas *Johnson*, *Paddy* and *Crews* all involved information that was known/knowable to the defense, the precise information that the Commonwealth suppressed in the instant case was beyond the scope of appellee's knowledge. The evidence that the Commonwealth withheld was that Amos Norwood had engaged, or may have engaged, in inappropriate sexual behavior with other teenage boys in the past. Appellee obviously would have known about prior sexual encounters that *he* had had with Mr. Norwood.[49] But evidence that Mr. Norwood touched

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evidence be specifically identified with an explanation of why it is difference-making under the reasonable probability standard." *Id.* at 684.

As will be discussed in greater detail in the materiality section *infra*, the withheld evidence in the instant case is distinguishable from that which was suppressed in *Willis*. Unlike the suppressed statement in *Willis*, which was made by a co-defendant who would have pled the Fifth Amendment instead of testifying, rendering his prior out-of-court statement inadmissible hearsay, the statements crediting and corroborating appellee's account of inappropriate sexual activity with the victim would have been the backbone of an "alternate" defense theory, and *also* would have been admissible at trial. Therefore, it is possible to calculate the impact that such evidence would have had at the guilt and penalty phases of trial. Whereas in *Ly*, the impact of evidence supporting an alternate defense theory would not have been "material," this Court found that the evidence withheld in the instant case satisfied the prejudice inquiry because it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the [jury] verdict" of death. *Kyles*, 514 U.S. at 435.

49. Two pieces of evidence from trial suggest that appellee told Ronald Rucker and Draper something about a prior sexual encounter that he had had with Mr. Norwood. In Mr. Rucker's July

Ronald House's genitals, that Reverend Poindexter had received at least one complaint about a specific instance in which Mr. Norwood was sexually inappropriate with a teenage male, and that Mr. Norwood's wife awoke in the middle of the night as her husband left the house with a "young male, slim" and later related a bizarre story to her, was undoubtedly beyond the scope of appellee's conceivable knowledge.

18, 1984 statement to police, he noted that, "Terry said Amos was a homosexual and was the type to pay people." Two days later, Draper told police that, while appellee was retrieving tools from the car "with which the murder would eventually be committed, Draper asked Mr. Norwood, "So you like boys?" to which Mr. Norwood responded, "Yea." Additionally, Dr. David Lisak interviewed appellee on January 11, 2012, January 27, 2012 and February 29, 2012 for a total of approximately 12 hours. Following these interviews, Dr. Lisak wrote that appellee gave him a detailed account of how his sexual relationship with Mr. Norwood began, and how during their multiple sexual encounters, violence had erupted on previous occasions. *Appendix to Petition for Post-Conviction Relief*, 7/16/2012 at Table 12. Due to the posture of the proceedings before this Court, this Court did not hear testimony from Dr. David Lisak, and no one has heard testimony from appellee regarding sexual encounters between him and Mr. Norwood. There has thus been no opportunity for their credibility to have been determined.

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Additionally, any sexual encounter appellee may have had with Mr. Norwood is critically different from the evidence that the government suppressed[50] The

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50. Had evidence that Mr. Norwood was sexually involved with other teenage boys been disclosed, it would have corroborated and credited appellee's own experience. As noted *supra*, appellee had never testified as to his own experience with Mr. Norwood or others, although there was certainly information from other witnesses – some of whom were called by the Commonwealth at his two trials – about his having been sexually active with older males from a young age. This Court has certainly seen in recent years and in cases of such high publicity as the recent Jerry Sandusky trial that young male victims of older male sexual abuse typically do not report such behavior and find it extremely difficult and painful to talk about it.

At trial, appellee testified that, on the night of the killing, a friend, Michael Hopkins, introduced him to Amos Norwood for the first time. N.T. 1/27/1986 at 1178-79. The fact that appellee's trial testimony is inconsistent with the argument that would flow from the suppressed evidence is not dispositive of whether the prosecutor had a duty to disclose such evidence under *Brady*. As stated *supra*, in *Ly*, our Supreme Court held that evidence supporting an alternate defense theory was "improperly withheld" after recognizing how the withheld evidence specifically could have been used at trial. *Ly*, 980 A.2d at 78. The fact that "a defendant may predicate a *Brady* claim upon prosecutorial suppression that causes the defendant to 'abandon lines of independent investigation, defenses, or trial strategies that [he] otherwise would have pursued,'" means that appellee's trial testimony that he only met Mr. Norwood the night of the murder does not spoil the instant claim. *Maynard v. Gov't of the Virgin Islands*, 392 Fed. Appx. 105 (3d Cir. 2010) (non-precedential opinion), *citing U.S. v. Bagley*, 473 U.S. 667, 683 (1985) (Blackmun, J., concurring). Had the prosecution disclosed evidence of Mr. Norwood's homosexual ephebophilia in a timely fashion, a reasonable defense attorney could have pursued a penalty-phase strategy centered around Mr.

suppressed evidence would have allowed reasonable trial counsel to argue that Mr. Norwood was not in control of his impulses. And it would have afforded appellee the opportunity to compare himself to other young victims – whether he testified or not – in contrast to the prosecution's portrayal of him during the penalty-phase closing argument as a cold, calculating killer.[51] But without the suppressed evidence of specific instances of Mr. Norwood's sexual improprieties with other teenagers, any allegation or insinuation from appellee that he had a sexual encounter with Mr. Norwood, which in turn played a role in the commission of the crime, would have merely seemed like an attempt by appellee to sling mud on the victim's character. In other words, that theory would have been incredible. Armed with the complete picture of Mr. Norwood's ephebophilia, appellee "could have much more

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Norwood's sexual improprieties with teenage boys, and how that was a "circumstance of [appellee's] offense" under 42 Pa.C.S. § 9711(e)(8).

51. During her closing argument at the penalty phase, Ms. Foulkes stated:

> He has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them. He thought of no one but himself, and *he had no reason* to commit these crimes. He would have gone on committing those crimes had our system of justice not stopped him. I am asking you, ladies and gentlemen, to impose the death penalty because our system of justice must stop him. He must be stopped.

N.T. 2/3/1986 at 1876-77 (emphasis added).

effectively attacked the Commonwealth's case" at the penalty phase.[52] *Simmons*, 590 F.3d at 238.

Brady Components

There are three essential components that appellee must demonstrate in order to establish a *Brady* violation: (1) the evidence was favorable to the accused, either because it is exculpatory or because it is impeaching,

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52. In *Commonwealth v. Martin*, a capital case, a 74-year old homosexual male, Guy Goodman, had written, called and visited the defendant while he served a sentence at the Lebanon County Correctional Facility. 5 A.3d 177, 180 (Pa. 2010). The defendant was given permission to leave the prison for two hours. Along with a conspirator, he took that time to go to the home of Mr. Goodman, who propositioned the defendant for sex in exchange for money. The defendant responded by striking the man in the head with a vase, and then duct-taped a plastic bag over Mr. Goodman's head, stole his property and left him to die. *Id.* at 181. Our Supreme Court concluded that trial counsel had been ineffective for failing to present evidence at the penalty phase that the defendant had been treated for mental disorders arising from sexual abuse by his own uncle, as it would have supported mitigating factors §§ 9711 (e)(2), (3). *Id.* at 203. The *Martin* Court's conclusion that counsel was ineffective for failing to present that evidence was grounded in the notion that evidence tending to establish an illicit relationship between the victim and the defendant is relevant for mitigation. *Id.* at 202 (finding that the defendant's history of sexual abuse and "the sexual advances the male victim made to Martin immediately prior to the murder placed Martin under the influence of extreme mental or emotional disturbance at the time of the murder," a mitigating factor). The fact that the evidence probative of such a relationship is circumstantial – as the suppressed evidence was in this case – does not make it less relevant.

(2) the evidence was suppressed by the Commonwealth, either willfully or inadvertently, and (3) the evidence was material, in that its omission resulted in prejudice to the accused. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Commonwealth v. Dennis*, 17 A.3d 297, 308 (Pa. 2011) (reversing the order of the first and second elements).

3. "Essential Component" of Brady #1

The first "essential component of a *Brady* violation" requires that the evidence at issue be admissible, relevant to the jury's decision, and "favorable to the accused because it is exculpatory or because it is impeaching." *Strickler*, 527 U.S. at 281-82.

In the instant case, the suppressed evidence could have played a role at trial to impeach doe testimony of Mamie Norwood and of Reverend Poindexter, and its absence was relied upon by the trial prosecutor for her penalty-phase closing argument. The information eliminated from the respective statements of Mamie Norwood and Reverend Poindexter would have allowed a reasonable defense attorney to impeach them after they testified to the following:

(a) Mamie Norwood:

> ADA FOULKES: You had indicated, in response to questions by the defense attorney, that your husband didn't pick up strangers. Did your husband have occasion to take young people back and forth from time to time in his car?

MAMIE NORWOOD: The ones that he worked with, yes, that I knew.

ADA FOULKES: How much of his time would you say, if you know, how often would he do that? Often? Rarely? Middle?

MAMIE NORWOOD: It would be every week at some point.

ADA FOULKES: And then from time to time, he would chauffeur young people from one point to another; would he not?

MAMIE NORWOOD: The ones that I know he works with, yes.

ADA FOULKES: When he would do that, would he take those young people home?

MAMIE NORWOOD: Yes.

ADA FOULKES: From time to time, did you ever see evidence of that chauffeuring process by things left in your car?

MAMIE NORWOOD: Yes, sometimes.

N.T. 1/14/1986 at 157-58.

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(b) Reverend Charles Poindexter[53]:

> ADA FOULKES: Did Mr. Norwood have any special responsibility in the church regarding youth?
>
> REV. CHARLES POINDEXTER: Yes, he did.
>
> ADA FOULKES: What were those responsibilities?
>
> REV. CHARLES POINDEXTER: He was warden for many years of the acolytes or the

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53. In its Motion to Dismiss, the Commonwealth acknowledged that Reverend Poindexter's trial testimony was devoid of any reference to Amos Norwood's homosexual ephebophilia:

> Reverend Poindexter did not remotely suggest any of this [impropriety about Amos Norwood] in his testimony at defendant's 1986 trial. In September 1984, Reverend Poindexter reported to *The Inquirer* that the victim "devoted his life almost entirely to working with young people." Reverend Poindexter further commented that St. Luke's had been packed with more than 1,000 mourners at each of two funeral services for the victim and that his ashes were buried in the church yard. *See Philadelphia Inquirer* Article entitled, "When a Model Teenager is Accused of Murder," dated Sept. 6, 1984.

Commonwealth Motion to Dismiss, 9/7/2012, at 32.

service of the church, and he was in charge, he was the founder and in charge of what we called the Youth Theater Fellowship which dealt with youth between the ages of seven and eighteen.

ADA FOULKES: Were there occasions, Reverend, in connection with his duties, where Mr. Norwood would come to the church in the night hours to fulfill some of these duties?

REV. CHARLES POINDEXTER: Yes, there were.

ADA FOULKES: Also, in your contact with Mr. Norwood, did you observe him from time to time transport young people from the church activities to their homes or other locations?

REV. CHARLES POINDEXTER: Frequently.

N.T. 1/14/1986 at 166-67.

[*Re-direct*]

ADA FOULKES: Reverend, from time to time, do the church activities extend beyond the people who are parishioners and members of the church?

REV. CHARLES POINDEXTER: Yes, they do.

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[*Re-cross*]

MR. PANARELLA: Certainly, church activities or functions are for church members; is that correct?

REV. CHARLES POINDEXTER: Well, the activities that Mr. Norwood participated in very often involve young people outside of our parish congregation. In fact, many who are now active came in as a result of that kind of inclusion.

MR. PANARELLA: And that would occur at organized functions; is that correct?

REV. CHARLES POINDEXTER: Not necessarily. Sometimes they were simply trip services where they were invited to participate.

MR. PANARELLA: There were no church services occurring late in the evening on June 11th; were there?

REV. CHARLES POINDEXTER: Oh, no, of course not.

MR. PANARELLA: And there is nothing of any youth activities or anything of that nature that was going to take place at your church at that time; correct?

REV. CHARLES POINDEXTER: No.

MR. PANARELLA: So when you make reference to unusual or that it would not be unusual to have non-church members come to church functions, it would have been extremely unusual to have a non-parishioner at the church when no church functions were going on?

REV. CHARLES POINDEXTER: No, it would not have been.

MS. FOULKES: Objection.

THE COURT: Overruled.

REV. CHARLES POINDEXTER: No, it would not have been.

MR. PANARELLA: It would not have been unusual to have a non-church member at a non-church function late at night when the church wasn't open to the public?

REV. CHARLES POINDEXTER: No.

MR. PANARELLA: That's correct?

REV. CHARLES POINDEXTER: Would you like me to explain?

MR. PANARELLA: Yes.

REV. CHARLES POINDEXTER: Very often,

Mr. Norwood had friends of some of the young people to help with the building of the sets for the plays and, quite often, I saw him with young people or the people who were working with him people that I never knew before.

MR. PANARELLA: Again, you never knew Mr. Williams?

REV. CHARLES POINDEXTER: I never knew Mr. Williams.

MR. PANARELLA: Or Mr. Draper?

REV. CHARLES POINDEXTER: No.

MR. PANARELLA: Now, you were aware, were you not, that Mr. Norwood had some problem in the past?

REV. CHARLES POINDEXTER: Some problem?

ADA FOULKES: Objection, Your Honor.

THE COURT: Just a moment. I am going to sustain it. I don't know quite what it is or how it is related to the circumstances here, so I will have to sustain the objection at this time.

MR. PANARELLA: I have nothing further.

Id. at 172-74.

Reasonable defense counsel, having had this evidence prior to trial, would have pursued an alternate strategy in the defense case-in-chief. Though the decision to testify in one's defense is a decision that a defendant must make for himself/herself, defense attorneys have a responsibility to advise their clients about that decision. *See Commonwealth v. Carson*, 741 A.2d 686, 689 (Pa. 1999) ("It is well settled that the decision to testify on one's behalf is ultimately to be made by the defendant after full consultation with counsel."). With the withheld evidence of Norwood's sexual improprieties with other teenage boys in hand, thereby strengthening the inference that appellee had been sexually exploited by a man almost 40 years his elder, reasonable defense counsel could have attempted to convince his client to stay off the stand. Non-disclosure adversely affected trial counsel's preparation, as consulting with one's client – and being able to discuss the implications of all of the evidence, and particularly of the exculpatory evidence – is a staple of trial preparation. Had the information in the police activity sheet, containing the full statements of both Reverend Poindexter and Mamie Norwood, been included in the statements which were turned over in discovery, it could have been used by a reasonable defense attorney to properly cross-examine both witnesses where they characterized Mr. Norwood as a kind church volunteer who wanted to help out the kids of the neighborhood. When Mamie Norwood testified that her husband only chauffeured young people that he knew from the church, the Commonwealth "opened the door" to her being cross-examined about her knowledge of Mr. Norwood bringing a young, slim male into their

home before driving away with that young man in his car and not returning until the next morning. Likewise, when Reverend Poindexter testified that Mr. Norwood spent a great deal of time with the acolytes and young people building sets for the church's youth theater group, the Commonwealth "opened the door" to cross-examination about Reverend Poindexter's knowledge that Mr. Norwood had been sexually inappropriate with parishioners.

In addition to the cross-examinations of Mamie Norwood and Reverend Poindexter during the trial, reasonable defense counsel would have called Ronald House to testify during the penalty phase to further flesh out the circumstantial evidence demonstrating that Mr. Norwood was a homosexual ephebophile.[54] Even if appellee never testified about experiencing Mr. Norwood's sexual improprieties, this collection of evidence would have been a sufficient basis upon which a reasonable defense attorney could have vigorously attacked Ms. Foulkes' penalty-phase characterization of the victim as "innocent," and argued during his/her penalty phase closing argument that Mr. Norwood had victimized appellee just as he had done to others, and that those sexual advances had impaired appellee's judgment on the night of the murder.

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54. Ronald House's testimony that Mr. Norwood attempted to take advantage of him sexually when the two were alone would have been admissible at the penalty phase in 1986, just as it would be admissible today. Pa.R.E. 401 codified the definition of relevance set forth in *Commonwealth v. Scott*, 389 A.2d 79, 82 (Pa. 1978): "Evidence which tends to establish some fact material to the case, or which tends to make a fact at issue more or less probable, is relevant." Evidence that Mr. Norwood had sexually inappropriate relationships with underage males tends to establish the fact that he also had a sexually inappropriate relationship with appellee.

Appendix F

Facts which strengthen the inference that Mr. Norwood made sexual advances on appellee significantly color "the circumstances of the offense," adding another dimension crucial to making a truly "individualized assessment, and imposing a sentence that "should reflect a reasoned *moral* response to the defendant's background, character, and crime." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original). A reasonable defense attorney would have highlighted how Mr. Norwood's pattern of impropriety was a "circumstance of [this] offense,"[55] offering a reason to view appellee through a mitigating lens. Having established that there is "some" evidence of a mitigating circumstance, a trial judge "shall" instruct the jury on that mitigating circumstance. 42 Pa.C.S. § 9711(c)(1)(ii). When viewed in combination with the details of the crime, evidence of Mr. Norwood's prior improprieties would cast this offense in an entirely different light; the withheld evidence credits and corroborates appellee's own account of having been victimized by Mr. Norwood.[56] Thus, the first essential component that the withheld evidence was favorable to the accused – has been established.

2. "Essential Component" of Brady #2

The second "essential component of a *Brady* violation" requires that the evidence at issue be "suppressed by the government, either willfully or inadvertently." *Strickler*, 527 U.S. at 282. Evidence, whether in the possession of the

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55. 42 Pa.C.S. § 9711(e)(8).

56. For a full discussion of how the withheld evidence would have altered the jury's perception of the "details of the crime," see the "materiality" section *infra*, p. 50-51.

prosecution or the police, is subject to the *Brady* duty to disclose. In order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles*, 514 U.S. at 437. For over a decade, our Supreme Court has endorsed that same principle. *Commonwealth v. Burke*, 781 A.2d 1136, 1142 n.5 (Pa. 2001) (finding it immaterial that a prosecutor was unaware of relevant statements in police files, given that "[t]his Court cannot ignore the obvious implications of *Kyles*."); *Commonwealth v. Gibson*, 951 A.2d 1110, 1127 (Pa. 2008) ("The prosecution's duty under *Brady* incorporates disclosure of all exculpatory evidence, regardless of whether the defense specifically requests such materials, and extends to evidence in the possession of police agencies of the same government bringing the prosecution.") (internal citations omitted).[57]

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment

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57. There is no dispute that the Philadelphia District Attorney's Office and the Philadelphia Police Department are part of the "same government." Ms. Foulkes' handwritten note about Ronald House being touched on his genitals and hearing of other possible incidents of sexual abuse was found in the District Attorney's Office trial box for the Norwood case. (See Attachment D, which was marked as Court-2 in the PCRA hearing before this Court.) The June 1984 activity sheet, which detailed the complete versions of the Poindexter and Norwood interviews, was found in the H-84-127 police box. (See Attachment E, which was marked as P-24 in the PCRA hearing before this Court.) Under *Kyles* and *Burke*, all of this evidence is properly considered to be within the scope of the prosecutor's control.

irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87 (emphasis added). Though the prosecutor's intent is unimportant in a pure *Brady* analysis, Pennsylvania courts have found that prosecutorial "gamesmanship" amounting to a violation of discovery rules can be an independent reason to shape a remedy for a defendant where such gamesmanship prejudices the defendant in his ability to present a defense. *Commonwealth v. Moose*, 602 A.2d 1265, 1273-75 (Pa. 1992) (finding that where the prosecutor hid a statement from defense counsel and told the court that "all available evidence had been provided" requited that a new trial be granted because it prejudiced the defendant and otherwise, the court "would be condoning and encouraging such last minute disclosures and gamesmanship."). The *Moose* Court relied on *Commonwealth v. Thiel*, 470 A.2d 145, 149 (Pa.Super. 1983), where the Superior Court fashioned a remedy for a defendant after the government withheld information that should have been disclosed under Pa.R.Crim.P. 305(B)(1)(f). The *Thiel* Court referred to Pa.R.Crim.P. 305(E), which "gives the trial court broad discretion in formulating remedies for a failure to comply with discovery requirements," as the foundation for its decision to grant a new trial. In both *Thiel* and *Moose*, the courts of our Commonwealth found that the proper remedy for prosecutorial "gamesmanship" which violated the rules of discovery and highly prejudiced the defendant was a new trial; here, this Court found that the proper remedy was a new penalty phase.[58]

The "sanitization" of the statements turned over to defense counsel, and the non-disclosure of the information

58. See the Appendix for this Court's detailed findings.

contained in Ms. Foulkes' handwritten notes demonstrates that evidence was plainly "suppressed." That suffices to establish the second prong of a *Brady* violation.

3. "Essential Component" of Brady #3

The third and final "essential component of a *Brady* violation" requires that "prejudice ... ensued." *Strickler*, 527 U.S. at 282. "Prejudice" in this context is defined by the concept of "materiality." For suppressed evidence to be considered "material," there must be a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,"[59] *Cone v. Bell*, 556 U.S. 449, 470 (2009), *citing Kyles*, 514 U.S. at 435.

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59. In its October 2, 2012 filing in the Supreme Court, the Commonwealth argued that the Supreme Court has already decided that, had evidence from the 1998 PCRA hearing been presented to the jury, the jury would still have voted for death rather than life: "That 'evidence' pales in comparison to the evidence before this Court in the prior appeal – evidence from witnesses who claimed that defendant himself was abused by the victim. This Court ruled such evidence insufficient to change the sentencing verdict." *Commonwealth's Reply to Defendant's Response to Emergency Application to Lift Illegal Stay of Execution*, 10/2/2012 at 12-13.

In fact, the Supreme Court's 2004 opinion did not rule that evidence of the victim's homosexual ephebophilia And its potential impact on appellee was insufficient to change the sentencing verdict. Our Supreme Court divided the evidence appellee put forth about

counsel's ineffectiveness at trial into three different categories. The Court's review of "the prejudice prong of the ineffectiveness inquiry," which is "in terms of whether 'there is a reasonable probability that at least one juror would have struck a different balance,'" practically was limited to the evidence that appellee claimed trial counsel should have presented. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).Writing for the majority, Mr. Justice Eakin first affirmed Judge Savitt's decision that trial counsel was not ineffective for failing to rely on Dr. Edwin P. Camiel's 1985 presentence report given that the report gave "no indication of petitioner's mental impairment at the time of the murder." *Williams II*, 863 A.2d at 520. The Court then affirmed Judge Savitt's conclusion that trial counsel was not ineffective for failing to present witnesses who could have testified to appellee's abusive childhood. *Id.* at 519-21. Lastly, the Court endorsed Judge Savitt's conclusion that trial counsel was not ineffective for failing to present mental health experts on Appellee's behalf. *Id.* When upholding Judge Savitt's decision that appellee failed to demonstrate a reasonable probability that the introduction of mental health expert testimony would have undermined confidence in the verdict, Mr. Justice Eakin deferred to Judge Savitt's determinations in weighing the evidence: "Accordingly, we perceive no abuse of discretion by the PCRA court in weighing the evidence, and we will not disturb the court's determination." *Williams II*, 863 A.2d at 520.

But, as noted *supra*, after the Commonwealth confirmed Judge Savitt's incomplete understanding of the evidence that "there is nothing in the case involving Norwood's homosexuality or violation of young boys," Judge Savitt dismissed the impact that such information would have had when he engaged in weighing the testimony. N.T. 4/8/1998 at 158-59, 181-82; N.T. 4/9/1998 at 360-61; N.T. 4/13/1998 at 597-605. In other words, Judge Savitt found that any evidence of Amos Norwood's homosexual impropriety was not worthy of consideration in light of the Commonwealth's misrepresentation that it did not exist. Accordingly, neither Judge Savitt nor our Supreme Court has ever had occasion to address whether or not

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> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to ... reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice.

Brady, 373 U.S. at 87-88.

When undertaking the "materiality" analysis, the Court in *Kyles* echoed that "[f]our aspects of materiality under *Bagley* bear emphasis" to help guide the determination. *Kyles*, 514 U.S. at 434. The fourth aspect is particularly relevant to this case: "materiality is to be judged by reference to the "suppressed evidence considered collectively, not item-by-item" with the focus on the "cumulative effect of suppression." *Kyles*, 514 U.S. at 437; *Ly*, 980 A.2d at 84. Practically, courts analyze the "cumulative effect of suppression" through two inquiries: whether suppression negatively impacted the defense's case, and whether the government took advantage of the fact that evidence favorable to the accused was withheld.

In *U.S. v. Perdomo*, the Third Circuit measured the impact of suppression on the defense's case by considering the "possible effects of non-disclosure on the defense's trial preparation," and by asking whether had that

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there is a reasonable probability that, had reasonable trial counsel presented to the jury the suppressed evidence of Amos Norwood's sexual improprieties with teenage boys, such evidence would have undermined confidence in the verdict at the penalty phase.

evidence been "*disclosed and used effectively*, it may make the difference between conviction and acquittal." 929 F.2d 967, 971-72 (3d Cir. 1991) (emphasis in original). In that case, the government unknowingly misrepresented to the defense that its key witness did not have a criminal history, despite that witness in fact having two prior convictions. *Id.* at 970-72. "Such information would have been critical in presenting the witness' mental state, demeanor and behavior to the jury, and in questioning the witness' credibility." *Id.* at 972. The *Perdomo* Court stressed that the impact of suppression on the testimony that the defense "would have been able to elicit" was magnified by the government's misrepresentation, which misleadingly induced defense counsel into believing that the witness could not be impeached. *Id.* The cumulative impact of suppression presented an "undisputable argument that a *Brady* violation occurred." *Id.* at 974.

While the *Perdomo* Court tackled the "materiality" question from the perspective of how suppression impacted the defense's case, a number of other cases have emphasized that evidence is more likely to be considered "material" when the government seizes upon and exploits the presence (or absence) of the suppressed evidence. The *Kyles* Court considered the "word of the prosecutor" relevant to the materiality computation. The United States Supreme Court found impeachment evidence of two witnesses to be material in part because that evidence contradicted the argument set forth by the prosecutor during closing arguments. *Kyles*, 514 U.S. at 444 ("The likely damage is best understood by taking the word of the prosecutor, who contended during closing

arguments that Smallwood and Williams were the State's two best witnesses."). In *Banks v. Dretke*, as part of its "materiality" or "prejudice" analysis under *Brady*, the Supreme Court echoed that a prosecutor's comments may be relevant.[60] The fact that a prosecutor exploits the absence of suppressed evidence during its penalty phase closing argument – as the trial prosecutor did here – is another reason to consider the suppressed evidence "material":

> Regarding "prejudice," the contrast between *Strickler* and Banks's case is marked ... Most tellingly, the witness' testimony in *Strickler* "did not relate to [the defendant's] eligibility for the death sentence"; it "was not relied upon by the prosecution at all during its closing argument at the penalty phase." In contrast, Farr's testimony was the centerpiece of Banks's prosecution penalty-phase case.

Banks, 540 U.S. at 700-01 (citations omitted).

Recently, the Third Circuit blended both components of the materiality inquiry into one "overall" analysis. The

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60. Though *Banks* discussed whether or not there was a violation of the due process right to a fair trial for the prosecution's failure to correct false testimony, the Supreme Court explicitly stated that it granted relief under *Brady* and did not reach the issue as to whether or not relief was merited under *Giglio v. U.S.*, 405 U.S. 150 (1972). 540 U.S. at 690 n.11 ("Because we conclude that Banks qualifies for relief under *Brady*, we need not decide whether a *Giglio* claim, to warrant adjudication, must be separately pleaded.").

Simmons Court engaged in the "materiality" analysis by contrasting the picture that trial counsel would have presented had the suppressed evidence been disclosed against "what actually happened" at trial. *Simmons*, 590 F.3d at 238.

> Overall, the picture of what Simmons's trial would have been like had these four *Brady* violations not occurred is vastly different from what actually happened. The two key witnesses presented by the state would have been substantially less credible, thus undermining the main evidence implicating Simmons in Knaze's death and Cobaugh's assault. Therefore, we agree with the District Court and hold that, cumulatively, the Commonwealth's *Brady* violations leave us without confidence in Simmons's conviction.

Id. at 238-39.

Thus, it was particularly helpful to this Court, in assessing materiality, to compare the evidence in the government's possession against that which was given to appellee's counsel in discovery.[61] *See Dennis*, 17 A.3d at 309 ("A reviewing court is not to review the evidence in

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61. A November 15, 1984 letter from Arnold H. Gordon, Esquire, Chief of Homicide Unit to Nicholas Panarella listed the discovery – other than the Medical Examiner's report, which was sent under separate cover – that was passed upon Mr. Panarella's request. (See the first two pages only of Attachment F, marked Exhibit C-2 in the PCRA hearing before this Court).

isolation, but, rather, the omission is to be evaluated in the context of the entire record.").

(i) A June 1984 police activity sheet revealed that the police learned during a June 22, 1984 interview with Reverend Charles Poindexter that the victim "may have been a homosexual," and that Reverend Poindexter had "in fact received a complaint about five years ago from the mother of a 17 year old parishioner that deceased had propositioned the 17 year old for sex, (male)." Additionally, the activity sheet notes that Reverend Poindexter "added that deceased had worked with juvenile males in the parish for years, doing counciling [sic] work for disturbed males, and males with family problems." (See Attachment E, which was marked P-24 in the PCRA hearing before this Court, page 1). However, the version of the June 22, 1984 interview that the prosecution turned over to the defense omitted those portions of Rev. Poindexter's statement *entirely*. (See Attachment G, which was marked C-2 in the PCRA hearing before this Court, item 19).

(ii) The same June 1984 police activity sheet also revealed that the police learned that Mamie Norwood had told them about a time in which she awoke at 2 AM to find a "young male, slim," standing silently in the hallway of her home. Mrs. Norwood explained to police that her husband woke her to ask her for money. She then watched as her husband loaded some stereo equipment

into his car, and then he got in and drove off with the young man. Mrs. Norwood said that her husband returned home around 9-10 AM the next day and told her a "rambling" story about being "abducted," but that he was able to "escape" after using "psychology" on the captors "until they fell asleep." Mrs. Norwood remembered that he pleaded with her not to get the police involved. Additionally, Mrs. Norwood's eldest daughter was present during the interview, "but made no comment on her belief in the veracity of the story." (See Attachment E, which was marked P-24 in the PCRA hearing before this Court, page 2). However, the version of Mrs. Norwood's statement turned over to the defense omitted this portion of her statement *entirely*. (See Attachment F, which was marked C-2 in the PCRA hearing before this Court, item 17).

(iii) A handwritten note by Assistant District Attorney Andrea Foulkes in the District Attorney's Office's file for the Norwood matter recounted evidence of a specific instance of Amos Norwood's homosexual ephebophilia. She wrote the name of the young man, "Ronald House," "touched on privates," and that he "heard about other possible incidents." (See Attachment D, which was marked Court-2 in the PCRA hearing before this Court). However, none of that information was turned over to the defense.

Appendix F

Without the evidence in hand that explicitly or inferentially connected Amos Norwood to acts of homosexual ephebophilia, the information that was actually provided to the defense created the false impression that references to Amos Norwood's homosexuality and alleged "kidnapping" had nothing to do with who he really was or with the case.[62] The government did disclose Jesse Lofton's and William Scott's statements, both of which included one question as to the interviewee's possible knowledge regarding Amos Norwood being homosexual. Both interviewees answered in the negative.[63]

Without the evidence above, the defense had two pieces of information suggesting that Mr. Norwood was a homosexual: Ronald Rucker's statement that "Terry said Amos was a homosexual and was the type to pay

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62. The version of Reverend Poindexter's statement turned over to the defense mentioned the supposed "kidnapping." In the statement disclosed to the defense, Reverend Poindexter speculated that the kidnapping had something to do with "drugs" because Mr. Norwood worked as a chemist in New Jersey. Reverend Poindexter thought the incident was reported to the police. He was generally unclear as to what really happened. (See Attachment G, which was marked C-2 in the PCRA hearing before this Court, item 19). The fact that there was a clear version of this story from the one person who was an eyewitness and would actually know what happened – Mamie Norwood – goes to show that the defense was given a misleading, confusing picture based on the speculation of others.

63. See Attachments L (page 2) and M (page 3), marked C-2 in the PCRA hearing before this Court, referring to items 13 and 24, respectively.

people,"[64] and Draper's statement that, shortly before killing Mr. Norwood, appellee "was going to tell [Mamie Norwood] that Amos was gay. He wanted to extort money from him, but she did not pay no [sic] attention to him, she just kept walking to the house."[65] And the defense had one nebulous piece of information suggesting that Mr. Norwood was an ephebophile – Draper's statement that when he was alone with the victim in the cemetery, he asked Mr. Norwood, "So you like boys?" to which Mr. Norwood responded, "Yea."[66]

In two different places during her penalty-phase closing argument, the trial prosecutor's comments about appellee's motive for the commission of this crime could have been effectively rebutted – or precluded – had the suppressed evidence been disclosed. First, she said:

> Now ladies and gentlemen, you know the horrible circumstances of the death of Amos Norwood. You know that the defendant, Terrance Williams, for no other reason but that a kind man offered him a ride home, that he and another man tied him up in the darkness of a cemetery, and beat him to death, squashed him like a bug that you might be irritated with against a windshield, beat him with two blunt instruments.

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64. See Attachment N, which was marked P-10 in the PCRA hearing before this Court.

65. See Attachment O, which was marked P-2 in the PCRA hearing before this Court.

66. *Id.*

Appendix F

N.T. 2/3/1986 at 1873.

Shortly thereafter, the trial prosecutor concluded, "He has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them. He thought of no one but himself, and he had no reason to commit these crimes." *Id.* at 1876-77.

However, as someone who had the privilege of viewing the suppressed evidence in the government's possession collectively during the kind of trial preparation in which reasonable defense counsel would also have engaged, Ms. Foulkes admitted at the PCRA hearing before this Court, "Did I suspect that there was a sexual connection between them? Yes I did." When this Court asked her, "so maybe [Williams] is doing Norwood and getting money?" she responded, "No. Of course it occurred to me ...." N.T. 9/20/2012 (P.M.) at 109-10. Ms. Foulkes stated "of course" she felt that there was a homosexual relationship between appellee and Norwood because she was able to connect all the dots. Without access to that same evidence, defense counsel was misleadingly induced into accepting the characterizations of Norwood that were included in the discovery packet, such as William Scott's statement that Norwood was "one of the straightest persons as far as I knew." (See Attachment M). Had evidence of Norwood's sexual proclivities for teenage boys been *"disclosed and used effectively,"*[67] a reasonable defense attorney could have drawn the jury's attention to such evidence during

67. *Perdomo*, 929 F.2d at 972.

the penalty phase, enabling the jury to connect the dots about a man in his mid-50s having a sexual relationship with yet another teenage boy.

Instead of having the trial prosecutor rebut her own penalty-phase closing argument more than 26 years after delivering it, had she disclosed the suppressed evidence, a reasonable defense attorney would have been able to directly contradict or prevent her argument that day. Not only would reasonable defense counsel have directly rebutted the centerpiece of the Commonwealth's penalty-phase closing argument – that appellee killed Amos Norwood "for no other reason but that a kind man offered him a ride home"[68] – but that attorney would have then explained how the sexual pressure imposed on appellee by Norwood was a "circumstance of his offense," as it clouded his judgment. The United States Supreme Court suggested in *Cone* there was a reasonable probability that, had the suppressed evidence crediting and corroborating an explanation for a defendant's aberrant behavior been disclosed, the result of the proceeding at the penalty phase would have been different. *Cone*, 556 U.S. at 470. Under Tennessee law, evidence tending to establish that a defendant's judgment was "substantially affected" is relevant to a jury's consideration as to whether death is the appropriate sentence. *Id.* at 456 n.3. Though the Supreme Court found that it would be inappropriate to be the first court to make the "materiality" determination, the Court noted that the suppressed evidence "may have persuaded the jury that Cone had a far more serious drug problem

68. N.T. 2/3/1986 at 1871-75.

than the prosecution was prepared to acknowledge, and that Cone's drug use played a mitigating, though not exculpating, role in the crimes he committed." *Id.* at 475.

Likewise, each of the documents withheld by the government in this case shared a common feature: each strengthened the inference that the victim was sexually involved with multiple teenagers in his community, and that potentially included appellee. As in *Cone*, the suppressed evidence would have been pertinent to explaining the bizarre behavior of the accused, as well as circumstances which might have motivated the killing. In both cases, the accused committed atrocious, violent crimes. *See Williams*, 637 F.3d at 200-01; *Cone*, 556 U.S. at 453. And, in both cases, the suppressed evidence could have been used at trial to persuade the jury that the defendant's judgment was "substantially affected," in contrast to the government's presentation of Mr. Cone as a "calculating, intelligent criminal who was fully in control of his decisions and actions at the time of the crimes,"[69] and in contrast to the government's presentation of appellee as a calculating, heartless killer,[70] despite having "all kinds of advantages." N.T. 2/3/1986 at 1873-75.

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69. *Cone*, 556 U.S. at 454.

70. The prosecution argued that appellee decided to pursue a life of crime, which culminated in his decision to "squash[] [the victim] like a bug that you might be irritated with against a windshield." N.T. 2/3/1986 at 1973.

Appendix F

Though the government suppressed only a few choice statements, the impact of suppression was far-reaching.[71] As part of the consideration of "the defendant's ability to investigate alternate defense theories and to formulate trial strategy"[72] this Court found that reasonable defense counsel could and would have taken the following measures had the suppressed evidence been disclosed: during the penalty phase, reasonable defense counsel would have re-called Reverend Poindexter, questioning the Reverend about the basis of his belief that Mr. Norwood was a homosexual, that Mr. Norwood had used his position at the church to surround himself with adolescent boys – he had in fact established a Youth Theater group, and that complaints had been lodged about Norwood's sexual advances on some of those boys. That testimony would have changed at least one juror's view of Mr. Norwood.

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71. In *Lapointe v. Commissioner of Correction*,_ A.3d _, 138 Conn.App. 454 (Oct. 9, 2012), the Appellate Court of Connecticut held that a police detective's note – which read "30-40 mins. Poss." – reflecting information that the detective had received from fire marshals as to a possible burn time of a fire allegedly set by the defendant, was suppressed. The *Lapointe* Court found that this evidence, which would have been used to buttress an alibi defense, was "material." As demonstrated by *Lapointe*, even small handwritten notes found in the government's files will be considered "material" when supporting a theory that contradicts evidence of guilt put forth by the prosecution. While this recent case obviously has no precedential value in Pennsylvania, this Court found *Lapointe* to be helpful, as Ms. Foulkes' handwritten notes and the other items suppressed would have supported a theory contradicting evidence of culpability meriting death put forth by the prosecution.

72. *Ly*, 980 A.2d at 76.

It would have been natural to second-guess whether Mr. Norwood intended to engage in a sexual act with appellee on the night of the murder. Viewed through that lens, reasonable defense counsel would also have recalled Mamie Norwood in order to highlight the parallels between the decedent's actions on the night of the killing and the night in which Mr. Norwood brought a "young male, slim" into his home, then drove that person away in his car and did not return until the next morning. Draper testified at trial that appellee – a young, slim male – went into Mr. Norwood's home "for like 15, 20 minutes, and I was wondering what was taking him so long, so I walked back down the street, and that's when he was coming out of the house." N.T. 1/22/1986 at 668. After appellee emerged from Mr. Norwood's home with $10, Mr. Norwood picked appellee up in his car and drove off for a few minutes. *Id.* at 671-72. When they returned, appellee told Draper to ask for a ride home; Draper got in the car and directed Norwood, ultimately ending up at the cemetery, where he was killed. *Id.* at 672-75. The similarities between the night of the murder and the previous suspicious late-night activity with an adolescent boy supports the argument that appellee was another one of Norwood's teenage sexual targets. And finally, appellee would have called Ronald House to testify that when he and Mr. Norwood were alone, Mr. Norwood propositioned him for sex and touched his genitals.[73]

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73. Of course, armed with all of this evidence connecting these dots, reasonable defense counsel would also have hired an investigator to speak to the acolytes and youth theater participants with whom Amos Norwood worked at St. Luke's. *See* N.T. 1/14/1986 at 157-58; 166-67; 172-74. Many more victims of Mr. Norwood's ephebophilia might well have turned up.

Viewed cumulatively, the non-disclosed evidence would have enabled appellee's attorney to argue *credibly* in his closing argument during the penalty phase that Amos Norwood was a homosexual ephebophile who had taken advantage of a number of boys, including appellee. Appellee's penalty-phase closing argument could have focused on explaining how appellee's judgment was "substantially affected" by Norwood's sexual impropriety, which "may have been enough to have one juror find a mitigating circumstance, at which point the jury would have had to weigh the mitigating circumstances against the aggravating circumstances."[74] *Ly*, 980 A.2d at 85, *citing Commonwealth v. Rush*, 838 A.2d 651, 661 (Pa. 2003).

Considering the totality of the circumstances, including possible effects of non-disclosure on the defense's trial preparation, an argument by a reasonable defense attorney about how evidence of Norwood's sexual misbehavior with teenage boys meant that appellee lashed out as a result of having been sexually abused may have been enough to have one juror find a mitigating circumstance under § 9711(e)(8). Had evidence crediting appellee's experience with Norwood been available, it would have "tend[ed] to ... reduce the penalty," thereby

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74. If the jury was deadlocked, unable to unanimously vote for death, the judge would be required to impose a sentence of life imprisonment. *See* 42 Pa.C.S. § 9711(c)(v) ("The court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.").

"cast[ing] the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice." *Brady*, 373 U.S. at 87-88. Cumulatively, this evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" of death. *Cone*, 556 U.S. at 470.

Appellee demonstrated that this Court had jurisdiction and, for all of the reasons stated herein, that he is entitled to relief in the form of a new penalty phase.

BY THE COURT:

/s/_____
M. TERESA SARMINA, J.

APPENDIX G — APPENDIX TO OPINION OF COURT OF COMMON PLEAS-PHILADELPHIA COUNTY, DATED NOVEMBER 27, 2012

At the outset of the trial of appellee's case, the Honorable David N. Savitt explicitly directed the trial prosecutor, Ms. Foulkes, to not only fulfill her ordinary obligations to disclose exculpatory evidence, but to go beyond that and to turn over to the defense evidence that could be "peripherally" construed as exculpatory:

> Any evidence that is exculpatory to the defendant in this case, the Commonwealth is directed to make available to counsel. In determining what is exculpatory, I would ask that you construe it liberally, even peripherally so and that does not mean it is admissible. It is simply something to show Mr. Panarella. It is important you have evelything."

NT 1/6/1986 at 105.

Ms. Foulkes, however, did not comply with the Judge's directive. Instead of showing Mr. Panarella "everything," Ms. Foulkes did not share evidence favorable to appellee which was squarely within her possession. She did not inform Mr. Panarella that she knew Mr. Norwood had groped 16-year old Ronald House "on privates"[1]; that Reverend Poindexter knew that parishioners lodged "complaints" regarding Mr. Norwood's sexual

1. NT 9/20/2012 (P.M.) at 120-23; see Attachment D, marked as Exhibit Court-2 before this Court, page 2.

impropriety[2]; that as part of Draper's plea agreement, she would write to the Pennsylvania Board of Probation & Parole (Parole Board) on his behalf, detailing his cooperation with the government[3]; and that Mamie Norwood had informed her that after seeing appellee's photograph in the newspaper she remembered he was the one on her porch the day her husband disappeared.[4] Additionally, Ms. Foulkes failed to locate and turn over exculpatory evidence located in the police files. She did not provide a June 1984 Activity Sheet, in which Mrs. Norwood recounted a night where she woke up and saw both her husband and a young, slim male in the house, and then watched from the window as they got into Mr. Norwood's car and drove off.[5] That same activity sheet

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2. See Attachment Q.

3. See Attachment P, marked as P-15 in the PCRA hearing before this Court.

4. N.T 1/14/1986 at 120; see Attachment R, which was not marked as an exhibit in the PCRA hearing before this Court. Prior to the evidentiary hearing on September 20, 2012, appellee's counsel reviewed the contents of the District Attorney's trial boxes for less than six hours. Given the tight deadline imposed by the fact that appellee's execution was scheduled for October 3, 2012, a complete review of the flies was not practicable for anyone in the time allotted. In the interests of concluding its review, this Court again went through the contents of the files after the completion of the evidentiary hearing. Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen this document.

5. See Attachment E, marked as P-24 in the PCRA hearing before this Court.

also detailed a complaint from the mother of a 17-year-old parishioner about Mr. Norwood propositioning the boy for sex. Instead of following Judge Savitt's order to get "everything" to Mr. Panarella, Ms. Foulkes did not do so, even though the discovery packet containing the statements of Mrs. Norwood and Reverend Poindexter did not include the portions of their statements directly and indirectly substantiating Mr. Norwood's homosexual ephebophilia.

There is a common thread tying together the evidence that the trial prosecutor failed to disclose: almost every piece of evidence strengthens the inference that Mr. Norwood was sexually inappropriate with teenage boys, and had some semblance of a relationship with appellee. Not only does that pattern of non-disclosure violate appellee's due process rights under *Brady*, as well as the mandatory disclosure provision of the Pennsylvania Rules of Criminal Procedure,[6] but it also calls into question the trial prosecutor's intent as the architect of this prosecution. This Court found that, based on her decisions to disregard Judge Savitt's directive and based on her testimony at the September 2012 PCRA evidentiary hearing, Ms. Foulkes exhibited "gamesmanship," choosing not to disclose evidence that would have supported the contention that appellee had been the victim of Mr. Norwood's sexual advances.

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6. Pa. R. Crim. P. 305(B)(1), now codified at 573(B)(1), controlled at the time of appellee's trial. Rule 305(B)(I)(a) required that the Commonwealth disclose material evidence in the possession of the Commonwealth's attorney. Rule 305(B)(1)(d) mandated disclosure of "circumstances and results of any identification of the defendant by voice, photograph, or in-person identification."

Appendix G

In the Herbert Hamilton case, for which Ms. Foulkes had prosecuted appellee in early 1985 — nearly one year before prosecuting him in the Amos Norwood case — Ms. Foulkes aggressively sought a first degree murder conviction and imposition of the death penalty. She described the Hamilton prosecution to this Court as "an appropriate first-degree case." N.T. 9/20/2012 (A.M.) at 10, 80. This Court concurs that it was, in fact, an appropriate case for first degree murder. However, the jury returned a verdict of third degree murder. The trial judge, the Honorable Alfred F. Sabo, Jr., himself commented at appellee's sentencing that the verdict did not match up with the evidence presented: "This was a most horrible crime. How they came to third-degree, the intent to do bodily harm but not to kill, is beyond me." N.T. 6/3/1985 at 19. Despite the trial court's admission that the third degree verdict shocked him, Ms. Foulkes testified in the hearing before this Court that "[t]here was certainly a lot of issues [sic] here in any event and I didn't think it was an inappropriate verdict." N.T. 9/20/2012 (A.M.) at 80. Ms. Foulkes stated that she "didn't mind what the — what the verdict was." *Id.* And again later in the hearing, Ms. Foulkes reiterated that position:

> I didn't care what the verdict was as long as the jury considered all the evidence. I presented it to the best of my ability. If this had not been a death penalty, if the jury had not come back with the death penalty, that would not have worried me. If the juror [sic] had come back with third degree in the second case, that would not have bothered me.

N.T. 9/20/2012 (P.M.) at 95.

However, this Court did not find that testimony credible. This Court found that the third degree verdict in the Hamilton case colored Ms. Foulkes' decisions when she prosecuted appellee for the murder of Amos Norwood. First, Ms. Foulkes identified what she believed to be the reason that the jury returned a "compromised" verdict.[7] And then she attempted to eliminate evidence which caused the "compromised" verdict from being presented to the jury. In the hearing before this Court, Ms. Foulkes hypothesized that "a lot of issues" in the Hamilton case explained the jury's decision to return an inconsistent verdict. When asked what she meant by "issues," Ms. Foulkes responded, "Well, there were these sexual overtones and relationships and what have-you." N.T. 9/20/2012 (A.M.) at 80. The "sexual overtones and relationships," which she credited with leading the jury to reach a compromise verdict, revolved around the fact that a middle-aged man may have been paying appellee, still in his teens, for sex.

> In her opening statement in the Hamilton case, Ms. Foulkes had stated:
>
> However, Terrance Williams also had a secret life, and that secret life was his engagement in making money by hustling homosexuals for favors, for money, for clothing, for anything of value to him, and Herbert Hamilton was one of a number of people that Terrance Williams engaged in this.

7. N.T. 9/20/2012 (A.M.) at 79.

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> Herb Hamilton was not the only individual with whom Terrance Williams engaged in this kind of enterprise. You'll hear from Marc Draper that Terrance Williams had told him that he on other occasions sought to earn money, make money, what have you, by having homosexual acts with various individuals.

NT 2/14/1985 at 23.

And, during the trial of the Hamilton case, Ms. Foulkes represented to the Court, during her direct examination of Draper, that appellee was sexually involved with multiple older men.

> ADA FOULKES: Let me ask you this: do you know on how many occasions he had engaged in this kind of activity, that is, in exchange for sexual favors for money or for clothing or something of that nature —
> MR. GALLAGHER: Objection.
> ADA FOULKES: — based on what he told you?
> MR. GALLAGHER: Objection.
> THE COURT: Could I see you? Where are you trying to go? I don't understand your question.
> ADA FOULKES: That we're not talking about one person, we're talking about several different people, not just one individual. The purpose of the testimony is to indicate that Herb Hamilton is not the only person that he has ever engaged in this kind of activity with.

N.T. 2/20/1985 at 350-51.

> ADA FOULKES: All right. Now, on the other occasions that Terry discussed how he obtained money, had Terry indicated to you that with other individuals from whom he obtained money or clothing, that he engaged in sexual relations?
> MR. DRAPER: Yes.

Id. at 354.

Ms. Foulkes admitted to this Court that her knowledge of appellee's sexual past created an obvious implication that his relationship with Amos Norwood was substantially similar to his relationship with Herbert Hamilton. She testified, "Did I suspect that there was a sexual connection between them [appellee and Amos Norwood]? Yes I did." N.T. 9/20/2012 (A.M.) at 110. But Ms. Foulkes made certain that the jury did not see that sexual connection. When confronted about the existence of evidence supporting *her own* suspicion that Mr. Norwood had been sexually inappropriate with appellee at the PCRA hearing before this Court, Ms. Foulkes grossly misrepresented the evidence in the government's files. She stated that she "had not a scintilla of evidence that Mr. Williams had actually had any sexual relationship with Mr. Norwood." N.T. 9/20/2012 (A.M.) at 135. She told this Court that all witnesses who were asked about Mr. Norwood's homosexual tendencies "all said no." N.T. 9/20/2012 (P.M.) at 99. Specifically, Ms. Foulkes stated that she "had no information from Reverend Poindexter at the time there was anything untoward about any conduct in the church." *Id.* at 106.

This, however, the Court found to be absolutely contrary to the evidence which Ms. Foulkes had in hand. Hard evidence uncovered during the review of the government's trial files *directly* contradicted Ms. Foulkes' assertions. A note in Ms. Foulkes' own handwriting[8] recounted a specific instance in which Ronald House had been molested by Mr. Norwood.

> THE COURT: Does that refresh your recollection at all? It's a Ms. House and her son Ronald who is 16 years old. He had been in a play and was touched on his private [sic] and then it has some notation, I think in your handwriting, "Heard from others about possible incidents."
> MS. FOULKES: "Touched on privates, I don't do that, nobody would have to know" – I didn't remember this, but yes, there must have been this one report from a Ms. House.
>
> . . .
>
> So when it goes onto [sic] the part that you've highlighted, it says, "Son in play, Ronald, touched on privates, I don't do that, nobody would have to know, brought boy home and asked him not to say anything, and then he stopped coming to church, disappeared," and it says, "Never verified it, and 29 years, first

8. See Attachment D, marked as Exhibit Court-2 in the PCRA hearing before this Court.

> time," and then it says at the bottom, "Heard from others about possible incidents." That must have been Ms. House.

Id. at 121-22.

Additionally, a police activity sheet in the government's trial file revealed that Detective Daniel Bennett had uncovered information about Mr. Norwood being "linked to possible homosexual activities."[9] A handwritten note found in the District Attorney's Office's trial file demonstrates that Ms. Foulkes knew that Detective Bennett's investigation produced specific information about Mr. Norwood's sexual involvement with parishioners at his church.[10]

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9. See Attachment U, which was marked as Exhibit P-28 in the PCRA hearing before this Court.

10. The note in Ms. Foulkes' handwriting, which was not introduced as an exhibit at the PCRA evidentiary hearing, as it was not uncovered until this Court conducted a final review of the government's trial files following the conclusion of the evidentiary hearing, reads: "D. Bennett talks to Rev. Poindexter who advises of other complaints by parishioners re. dec'd's homosexuality." (See Attachment Q). This note suggests that Ms. Foulkes not only knew about Mr. Norwood's sexual orientation, but that she also knew of specific examples of Mr. Norwood's homosexual ephebophilia. Thus, this note is yet another piece of evidence corroborating this Court's conclusion that Ms. Foulkes was not credible when she said that all witnesses asked about Mr. Norwood's interest in teenage boys "said no." Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen this latter document.

Appendix G

Ms. Foulkes' statements to this Court about the dearth of evidence regarding Mr. Norwood's homosexuality weighed heavily on her credibility considering the evidence found in the government's trial files. This Court was unable to believe that she "had not a scintilla of evidence" about a sexual relationship between appellee and Mr. Norwood. This Court was constrained to find that Ms. Foulkes intentionally rooted out information which strengthened the inference of a homosexual connection between appellee and Amos Norwood from being presented to the jury by the defense.

This Court found that Ms. Foulkes chose not to disclose that evidence in an attempt to cure the "issues" that had led to a compromise verdict in the Hamilton case, and to keep as much as possible regarding those "issues" out of the trial of the Norwood case.[11] And after having failed to disclose this evidence, Ms. Foulkes then made a closing argument that contradicted her own belief about the true nature of appellee's relationship with Amos

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11. Not only did Ms. Foulkes keep these "issues" from being presented to the empanelled jury, but she also chose the jury with an eye towards weeding out jurors who might have been sympathetic to victims of sexual impropriety. Ms. Foulkes testified before this Court that a "second reason" she struck venireperson Alberta White was because Ms. White's "son had been sexually assaulted and one of the things that I look for in jurors is whether or not they would be emotionally able to separate out their personal experiences from issues that might arise during trial" N.T. 9/20/2012 (A.M.) at 131. Ms. Foulkes had also testified about striking Ms. White as part of the *Batson* claim raised in the 1995 PCRA petition. N.T. 4/16/1998 at 712.

Norwood.[12] When asked by this Court whether it occurred to her, "maybe he's [appellee's] doing Norwood and getting money," Ms. Foulkes admitted, "Of course it occurred to me." *Id.* at 109. Nonetheless, she argued:

> Now ladies and gentlemen, you know the horrible circumstances of the death of Amos Norwood. You know that the defendant, Terrance Williams, for no other reason but that a kind man offered him a ride home, that he and another man tied him up in the darkness of a cemetery, and beat him to death, squashed him like a bug that you might be irritated with against a windshield, beat him with two blunt instruments.

N.T. 2/3/1986 at 1873.

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12. During the penalty phase of the Norwood case, Ms. Foulkes called ADA Jeffrey Kolansky to testify about appellee's conviction for the burglary and robbery of Don and Hilda Dorfman. During her direct examination of Mr. Kolansky, Ms. Foulkes elicited details of the facts underlying that conviction. She asked Mr. Kolansky about the time of the offense, the nature of the offense, the type of weapon used, and how that weapon was used on Mr. and Mrs. Dorfman. N.T. 2/3/1986 at 1821-23. However, when Ms. Foulkes called Detective Lawrence Gerrard to testify about appellee's conviction for third degree murder in the killing of Herbert Hamilton, she shied away from asking questions about the facts of the offense. Besides basic information like the location, date and age of the victim, the only other question Ms. Foulkes asked was about the cause of death. *Id.* at 1826-28. The fact that Ms. Foulkes chose to present to the jury in the Norwood case some details of the Dorfman robbery, but not to do so with respect to the Hamilton killing is yet another indication that Ms. Foulkes did not want the jury in the Norwood case to learn about what she felt had been "issues" in the Hamilton case.

Appendix G

The major difference between the Hamilton and Norwood cases is that evidence of a sexual relationship between the middle-aged victim and appellee was presented to the jury in the first, but not in the second. The Court is quite mindful that Ms. Foulkes had no duty to do the defense's job for them, and she had the right to present a different theory of the case that focused on a robbery of the victim and not on a relationship that existed or might have existed between the victim and appellee. However, she did have a duty to provide the defense with that evidence, because it was exculpatory and "material." The fact that a portion of Ms. Foulkes' penalty phase closing argument — the culmination of prosecuting appellee for both the Hamilton and Norwood murders – focused on an aspect of the evidence that could have been rebutted by the withheld information more than suggests that Ms. Foulkes was aware of the significance of what was brushed under the rug. This Court concluded that intentionally rooting that evidence out of the Norwood case in order to secure a death penalty sentence amounted to "gamesmanship." As in *Thiel*,[13] where the government failed to disclose information and then "used [it] skillfully in rebuttal," Ms. Foulkes failed to disclose her knowledge of evidence of Norwood's sexual improprieties with teenage boys, as well as her belief that Norwood was sexually involved with appellee.[14] And, then, she

13. 470 A.2d at 149.

14. A review of Ms. Foulkes' notes prior to and during witness preps shows that she was an extremely thorough and meticulous prosecutor who did not want any surprises. When preparing for trial she had no way of knowing that appellee was going to testify that he

skillfully used the non-disclosure of that evidence in her penalty-phase closing argument, seizing the opportunity to characterize Amos Norwood as a sympathetic victim who had merely offered appellee a ride home. In *Thiel*, as noted in the body of this Opinion, our Superior Court labeled the prosecutor's gamesmanship "trial by ambush." Here, Ms. Foulkes' decisions constituted "penalty phase by ambush." Accordingly, this Court considered Ms. Foulkes' conduct as part of its decision to grant a new penalty phase hearing.

In addition, this Court found other behavior of Ms. Foulkes during the course of the Norwood trial to weigh into the finding that she was not credible when she said that she "didn't care what the verdict was as long as the jury considered all the evidence," which she maintained that she presented "to the best of [her] ability." N.T. 9/20/2012 (P.M.) at 95. Instead of following Judge Savitt's directive to make sure that Mr. Panarella had "everything," which would thereby have enabled the jury to consider "all the evidence," Ms. Foulkes withheld evidence that as part of Draper's deal to plead guilty to second degree murder, she promised to write a letter on his behalf to the Parole Board. Ms. Foulkes elicited

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had just met Mr. Norwood on the day of the killing. Everything in her possession pointed to the opposite. Appellee was admitted into Mr. Norwood's home, where he stayed for approximately 20 minutes. Shortly thereafter Mr. Norwood stopped and picked appellee up and drove off with him for a few minutes. Additionally, Ronald Rucker, who was called as a Commonwealth witness, had noted in his July 19, 1984 police interview that "Terry said Amos was a homosexual and was the type to pay people." See Attachment N.

testimony from Draper indicating that his *only* agreement with the Commonwealth was that in exchange for his truthful testimony against appellee, he would plead guilty to second degree murder, robbery and conspiracy for the murder of Amos Norwood. NT. 9/20/2012 (A.M.) at 165-66.

> ADA FOULKES: Now, when an agreement was made between your: attorney, yourself and the Commonwealth, was an agreement that was signed, which you have seen, made between the Commonwealth and your attorney at the time, Mr. Kenneth Dixon?
> MR. DRAPER: Yes.
> ADA FOULKES: Have you seen that agreement?
> MR. DRAPER: Yes.
> ADA FOULKES: Could I have this document marked C-18? Your: Honor, if I may substitute a copy for the exhibit, so I may retain the copy that we have marked.
> THE COURT: Sure.
> ADA FOULKES: Is that agreed, counsel?
> MR. PANARELLA: Yes.
> ADA FOULKES: Mr. Draper, do you recognize the document that's marked C-18?
> MR. DRAPER: Yes.
> ADA FOULKES: Is that the agreement between you and your: attorney and the Commonwealth of Pennsylvania in reference to this case?
> MR. DRAPER: Yes.
> ADA FOULKES: Is it dated August 16, 1984?
> MR. DRAPER: Yes.

ADA FOULKES: Does it read as follows: "This letter will confirm the agreement entered into this date between the Commonwealth -

[Discussion at sidebar, after which Ms. Foulkes read the August 16, 1984 letter to the jury.]

ADA FOULKES: Was that the agreement that you understood and entered into with the Commonwealth in this matter?
MR. DRAPER: Yes.

NT. 1/22/1986 at 660-63.

On cross-examination, Mr. Panarella followed up on Ms. Foulkes' questioning regarding Draper's "deal" with the Commonwealth. Draper's bolded responses to Mr. Panarella's pointed questions were false:

MR. PANARELLA: You have a deal; correct?
MR. DRAPER: Yes.
MR. PANARELLA: And that deal, at some point, was put down in a writing; is that correct?
MR. DRAPER: Yes.
MR. PANARELLA: Can I have C-18. Was there anything more agreed upon between you, your attorney, your family and the police or the District Attorney's office other than what is embodied within this document?
MR. DRAPER: No.
MR. PANARELLA: Nothing at all?
MR. DRAPER: No.

N.T. 1/23/1986 at 778-79 (emphasis added).

This Court found that testimony was false, as the letter Ms. Foulkes personally wrote on June 23, 1988, addressed to the Pennsylvania Board of Probation and Parole (Parole Board) mentioned *another agreement* between Draper and the Commonwealth — an agreement she never disclosed to anyone else.[15] During the PCRA hearing before this Court, Ms. Foulkes read aloud the following portion of that letter:

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15. In *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959), the Supreme Court of the United States expressed disapproval for a conviction supported by a lie:

> A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth ... That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

However, this Court was without jurisdiction to consider a claim under *Napue v. Illinois*, 360 U.S. 259 (1959) or *Giglio v. U.S.*, 405 U.S. 150 (1972) based on Draper's false testimony, given that the letter Ms. Foulkes addressed to the Parole Board had been in the public record since Draper filed a PCRA petition in his own case on May 10, 2000. Accordingly, appellee had failed to raise that claim with reasonable due diligence under 42 Pa. C.S. § 9545(b)(2). It is worth noting, however, that Ms. Foulkes' solicitation of false testimony on direct examination, *and* her failure to correct Draper's false testimony on cross-examination, could have been a potentially viable claim under *Giglio*, as non-disclosure of a promise made to a witness by the government, and subsequent testimony that there was no promise, violates a defendant's due process tight to a fair trial if "the false testimony could ... in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154, *citing Napue*, 360 U.S. at 271.

> Therefore, it is proper for you to consider the cooperation of this inmate when determining his eligibility for parole or commutation at some future date. That I provide you with the particulars of Mr. Draper's cooperation *was the only benefit or promise conveyed to him in exchange for his complete truthful cooperation.* I hope this information will be useful in your evaluations.

N.T. 9/20/2012 (A.M.) at 169 (emphasis added) (See Attachment P, marked as P-15 in the PCRA hearing before this Court).

The fact that Ms. Foulkes knowingly withheld evidence of an agreement with Draper and permitted him to testify falsely that there was no additional agreement contradicts her assertion before this Court that she wanted the jury to have "all the evidence." It is a reason why this Court could not avoid finding that Ms. Foulkes' testimony about being faithful to her discovery obligations was not credible, and that her conduct constituted prosecutorial "gamesmanship."

Yet another indication of Ms. Foulkes' "gamesmanship" was her decision not to provide Mr. Panarella with notice that the decedent's widow, Mrs. Mamie Norwood, was going to identify appellee as the male she had seen on her porch the day her husband went missing. Mrs. Norwood testified that she told Ms. Foulkes that she was able to identify appellee as the man she saw on June 11, 1984 at some point after the August 22, 1984 preliminary hearing. N.T. 1/14/1986 at 130. Ms. Foulkes' knowledge

of Mrs. Norwood's ability to make the identification was corroborated by her handwritten notes. See Attachment R, which was not marked as an exhibit in the PCRA hearing before this Court.[16] At the time of the Norwood trial, Pa. R. Crim. P. 305(B)(1)(d)[17] stated that the following information was subject to "mandatory" disclosure: "the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification." But Ms. Foulkes went ahead and asked Mrs. Norwood to make an in-court identification of appellee without ever having notified Mr. Panarella that she would be able to do so. N.T. 1/14/1986 at 103. Before the Court recessed for lunch, Mr. Panarella objected and moved for a mistrial based on a violation of the Pennsylvania Rules of Criminal Procedure.

> MR. PANARELLA: If it hasn't, then that will allow me to proceed with my cross examination. At some point, she came forward and indicated that there was a positive identification of Mr. Williams, because I cannot believe that the Assistant District Attorney would just ask that question blindly. I believe, Your Honor, that that significant event is something that would have been, should have been made available to the defense.

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16. Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen this document, although the issue of the withholding of this information was discussed at trial and on appeal.

17. Pa. R. Crim. P. 305 was renumbered on March 1, 2000 as Pa. R. Crim. P. 573.

THE COURT: When did you — did you know she was going to identify the defendant? Did she say that previously?
MS. FOULKES: Well, she told me that when she saw him in Court, and when she saw him in the newspapers, that she knew that that was the same made who had been on her porch.
THE COURT: Don't you think that is something that the defense counsel should have been apprised of?
MS. FOULKES: Your Honor, there are a number of things that are certainly discoverable. I don't think that it, in any way, that prejudices him to know or not to know.
THE COURT: If he is entitled to it and it's part of the discovery and it is an identification of a witness, the extent of the prejudice, of course, I am not characterizing or determining but the question first is shouldn't he have been given that information? You really had a statement of a witness who was going to identify a defendant at a crucial circumstance in court, and the order was to give the defense counsel copies of all statements.
MS. FOULKES: I gave copies of all statements.
THE COURT: You had an oral statement. You are saying that an oral statement, you don't have to give him?
MS. FOULKES: I think not, obviously.

N.T. 1/14/1986 at 103-05.

Appendix G

During Mr. Panarella's cross-examination of Mrs. Norwood, both Mr. Panarella and the Court clarified that, after the preliminary hearing, Mrs. Norwood told Ms. Foulkes that she was able to identify appellee as the person she saw on her porch on the night of her husband's murder.

> THE COURT: Did you ever tell the Assistant District Attorney or anyone that you were able to do that?
> MRS. NORWOOD: Yes.
> THE COURT: You may proceed.
> MR. PANARELLA: When you refer to an Assistant District Attorney, and I am correct to say that you are referring to this lady here?
> MRS. NORWOOD: Yes.

N.T. 1/14/1986 at 120.

> MR. PANARELLA: It is only after the preliminary hearing that you apparently come forward and discuss this with the Assistant District Attorney. Is that correct?
> MRS. NORWOOD: Yes.

Id. at 129.

Whether Ms. Foulkes' decision not to inform Mr. Panarella that Mrs. Norwood would identify appellee in court constituted a violation of Pa. R. Crim. P. 305(B)(1)

(d) is unimportant.[18] This Court found that Ms. Foulkes' decision to withhold this identification from Mr. Panarella was indicative of her state of mind while prosecuting appellee, and reflected on her credibility at the PCRA hearing before this Court in light of her steadfast claim that she "didn't care" about the jury's verdict.[19] Ms. Foulkes asserted to this Court that she wanted the jury to have "all the evidence," but this Court is disheartened to say that her actions leading up to and during the Norwood trial demonstrate that she only wanted the jury to see the evidence over which she exerted control.

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18. Mr. Panarella moved for a mistrial on the basis of Ms. Foulkes' failure to disclose Mrs. Norwood's ability to identify appellee. Judge Savitt did not consider Mrs. Norwood's statement to Ms. Foulkes to be an "identification" falling within the purview of Pa. R. Crim. P. 305(B)(1)(d). Had he considered it such, the identification would have been subject to mandatory disclosure. Instead, Judge Savitt found that this was a "substantially verbatim oral statement" falling under Pa. R. Crim. P. 305(b)(2)(ii), which was subject to discretionary disclosure. On appeal from the PCRA Court's denial of appellee's petition, the Supreme Court stated that there was no indication that the identification was deliberately withheld, nor had the identification been obtained by "suggestive means or by any other means in violation of appellant's constitutional rights." *Williams II*, 863 A.2d at 516.

19. Had Ms. Foulkes advised the defense in advance that Mrs. Norwood would be able to identify appellee in court, a reasonable defense attorney would likely have requested that a lineup be conducted. *Commonwealth v. Sexton*, 400 A.2d 1289, 1292 (Pa. 1979) (holding that a trial court cannot arbitrarily and capriciously deny a request for a lineup). Identifying someone in a lineup is much more difficult than when he is sitting alone next to defense counsel.

Appendix G

The last instance of Ms. Foulkes' conduct during the Norwood prosecution that this Court wants to highlight here for the sake of completeness, is that she failed to turn over a criminal complaint and an arrest warrant for a man named Andre Peterson, for having stolen Amos Norwood's credit cards and forged his signature at a jewelry store on June 13, 1984.[20] The Commonwealth did disclose to the defense a statement from Jesse Lofton in which he was asked whether he knew a man named Andre Peterson, as well as three separate statements from Maceo Waring, a jewelry store[21] clerk who sold gold chains to a man claiming to be Amos Norwood.[22] In Mr. Waring's first statement, he identified the man who produced Mr. Norwood's non-

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20. As seen on pages one and two of Attachment F — the table of contents of the discovery packet passed by the Commonwealth on September 15, 1984 — the documents supporting Andre Peterson's arrest for theft by deception and forgery of Amos Norwood's signature were not turned over to the defense. See Attachment S, which was not marked as an exhibit in the PCRA hearing before this Court. Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen these documents. This Court did not consider this evidence in its credibility determination of Ms. Foulkes as the Court had no indication prior to its final review of the government's files that anyone but appellee had ever been a suspect regarding the purchase of the gold chains. However, coming across these documents reaffirmed the Court in its earlier determination regarding Ms. Foulkes' credibility.

21. The jewelry store was called Walnut Solid Gold at 1312 Walnut Street, Philadelphia, PA.

22. See Attachment L, which was marked as Exhibit C-2, item 13 in the PCRA hearing before this Court, albeit for a different reason.

photo identification and paid for the gold chains with Mr. Norwood's credit card as Andre Peterson.[23] However, at trial, Ms. Foulkes called Mr. Waring to testify that it was appellee who had purchased the chains. N.T. 1/24/1986 at 933-34. This Court did not give consideration to whether Ms. Foulkes' failure to turn over the documents, which illustrated that there was probable cause to believe that Andre Peterson was the person who used Mr. Norwood's card, amounted to a violation of Pa. R. Crim. P. 305(B). Instead, it is apparent that Ms. Foulkes' failure to turn over the criminal complaint and arrest warrant for Andre Peterson is yet another instance in which the prosecutor erred on the side of not disclosing evidence that could have been favorable to appellee. It is further substantiation for this Court's finding that Ms. Foulkes' assertion that it would not have "bothered" her if the jury in the Norwood case returned a verdict of third degree murder was not credible.[24]

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23. See Attachment T, which was marked as Exhibit C-2, item 29(a) in the PCRA hearing before this Court.

24. This Court also examined Ms. Foulkes' prosecution of appellee in the Hamilton case, and found that she exhibited a pattern of playing "fast and loose" there as well. In the Hamilton case, after she had rested and appellee testified in his defense, Ms. Foulkes attempted to introduce prison letters written by appellee to Draper as evidence of appellee's consciousness of guilt. N.T. 2/21/1985 at 13. When she did so, appellee's trial counsel – Steven Gallagher, Esquire – objected on the grounds that he had previously requested all statements made by appellee, but had not yet received such letters. *Id.* at 619-20. After Mr. Gallagher reiterated his strong objection, Ms. Foulkes brought up the chronology of when she got the letters, clarifying a vague statement that she made earlier that she "got it

in the last week." In what appeared to be an attempt to soften the blow of having failed to disclose the letters, Ms. Foulkes clearly stated that she only received them the same week as the hearing, in late February 1985:

> MS. FOULKES: I might also point out for the record that the specific page or document that will be referred to or would be referred to in this trial I received only this past Monday. So that the record is clear on that.
> MR. GALLAGHER: What was that? You received these documents when?
> MS. FOULKES: This past Monday.
> MR. GALLAGHER: Monday of this week?
> MS. FOULKES: That's right.
> MR. GALLAGHER: That's the first time Draper turned them over to you?
> MS. FOULKES: No. That's when his father turned them over to me. He sent them to his father and his father kept them in safekeeping and then he met with the father for the first time on Monday, the Court holiday, this past week in Mr. Dixon's hospital. Mr. Dixon was in the hospital. That was for the first time.

Id. at 642-43.

However, the documents found in the government's trial file in the proceeding before this Court revealed that Ms. Foulkes had access to these letters roughly two months before the date that she told Mr. Gallagher and Judge Savitt that she had received them. Her handwritten notes indicate that during a prep session on Thursday, December 20, 1984, Draper told her that appellee had been providing him with "written alternate false stories," and "Marc will provide them to [Detectives] Cimino/McNesby next Fri. (See Attachment I, marked as P-8 in the PCRA hearing before this Court). Even if Ms. Foulkes was technically correct that she had only "received" the letters the week of the proceeding

in February, her statement was a shade of the truth. Instead of being forthcoming with the Court and stating that Draper told her about appellee's letters in December, Ms. Foulkes justified not having disclosed the documents by stating that she had only received them that week. Ms. Foulkes' credibility was assessed by this Court in light of her decision to deprive the trial court of relevant facts in order to improve her chances of securing admission of evidence favorable to her case. Just as Ms. Foulkes took questionable measures to help her case for the admissibility of the prison letters, it appears as though she employed a questionable tactic in preventing evidence favorable to appellee from being presented to the jury. Ms. Foulkes admitted to this Court that, during the Hamilton case, she sent Detectives John Cimino and James McNesby to talk to a potential defense witness, Gregory Lowe, before he was to take the stand. N.T. 9/20/2012 (P.M.) at 136-37. Mr. Lowe testified at the September 9, 1990 PCHA Hearing before Judge Sabo that Draper had told him in prison that he got Herbert Hamilton's keys from appellee, went to Hamilton's apartment and stabbed him in the neck after appellee had assaulted Hamilton. N.T. 9/10/1990 at 16. Mr. Lowe explained that he did not proffer that testimony at appellee's trial in the Hamilton case because the detectives told him that if he testified for appellee, "I can kiss my deal out, you know, kiss it down the river." *Id.* at 19. When questioned by this Court about her involvement regarding Mr. Lowe's decision not to testify, Ms. Foulkes denied playing a role. This Court did not accept Ms. Foulkes' testimony on that point, and considered her decision to send the detectives to speak with Mr. Lowe as an indication that she wanted to secure a first degree murder conviction in that Hamilton case and not, as she testified to this Court, that she "was not disappointed in the verdict" of third degree murder. N.T. 9/20/2012 (A.M.) at 79. Ms. Foulkes maintained a tight and careful control over all aspects of the evidence.

Appendix G

As the courts of this Commonwealth stated in both *Moose* and *Thiel*, prosecutorial gamesmanship may play a role in a trial court's decision to fashion an appropriate remedy. *Moose*, 602 A.2d at 1273-75; *Thiel*, 470 A.2d at 149. This Court did not find Ms. Foulkes' assertions that she "didn't care what the verdict was as long as the jury considered all the evidence" credible. Ms. Foulkes represented to this Court at the September 2012 PCRA evidentiary hearing that she did not have a "scintilla" of evidence suggesting a homosexual connection between appellee and Mr. Norwood, and that all witnesses who were asked about Mr. Norwood's homosexual impropriety "all said no." However, those representations turned out to be false, as there were documents in Ms. Foulkes' own handwriting that turned up in the government's files directly contradicting her statements that such evidence did not exist. Thus, this Court was constrained to find that Ms. Foulkes was not credible, and that she suppressed evidence which strengthened the inference that appellee had been the victim of Mr. Norwood's sexual advances. As such, Ms. Foulkes' conduct as the trial prosecutor in the Norwood case would properly be labeled "gamesmanship."

APPENDIX H — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, DATED OCTOBER 3, 2012

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 163 EM 2012, 560 CAP

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

TERRANCE WILLIAMS,

Respondent.

Emergency Commonwealth Application under Pa. R.A.P. 1702(d) & 3316 to Review Order Staying Execution

ORDER

PER CURIAM

AND NOW, this 3rd day of October, 2012, the Commonwealth's application for emergency relief is hereby **DENIED**. The Prothonotary is directed to set a briefing schedule.

Appendix H

A True Copy
As Of 10/3/2012

Attest: /s/_____
John W. Person Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

APPENDIX I — ORDER OF CHIEF JUSTICE CASTILLE DENYING MOTION TO RECUSE, DATED OCTOBER 1, 2012

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 163 EM 2012

Respondent's Motion for Recusal
of Chief Justice Castille

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

TERRANCE WILLIAMS,

Respondent.

ORDER

AND NOW, this 1st day of October, 2012, Respondent's Motion for Recusal is **DENIED,** as is the request for referral to the full Court.

s/_____
Chief Justice Ronald D. Castille

APPENDIX J — ANSWER TO RECUSAL MOTION, DATED OCTOBER 1, 2012

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 163 EM 2012

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

TERRANCE WILLIAMS

COMMONWEALTH'S ANSWER TO RECUSAL MOTION

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT:

R. SETH WILLIAMS, District Attorney of Philadelphia County, by his Assistants, RONALD EISENBERG, Deputy, Law Division, and HUGH J. BURNS, JR., Chief, Appeals Unit, respectfully answers defendant's "motion to recuse Chief Justice Castille" in the above matter, and thus states:

1. A seritaim answer is dispensed with for the sake of clarity.

Appendix J

Introduction

The PCRA court, without jurisdiction, granted a stay of execution and a new penalty hearing on defendant's untimely third PCRA petition challenging his 1986 murder conviction, five days prior to his scheduled execution. The Commonwealth moved to vacate that ruling pursuant to Pa.R.A.P. 1702(d) (stating that no separate notice of appeal or petition for review required to challenge stay of execution) and 3316.[1] In response, defendant moved (inter alia) to recuse the Chief Justice. This answer is directed to the Chief Justice rather than the full Court because such motions are within "the sound discretion of the jurist whose recusal is sought." *Commonwealth v. Williams*, 732 A.2d 1167, 1174 (Pa. 1999), citing *Goodheart v. Casey*, 565 A.2d 757, 762 (Pa. 1989); and *Commonwealth v. O'Shea*, 567 A.2d 1023, 1034 (Pa. 1989). The recusal motion is frivolous and should be promptly denied.

Standard of review

A party seeking recusal has the burden "to allege facts tending to show bias, interest, or other disqualifying events." *Reilly v. SEPTA*, 489 A.2d 1291, 1300 (Pa. 1985). The challenged jurist makes a "self-assessment" of his own ability to be fair, and may summarily dismiss "fabricated, frivolous, or scurrilous charges" made in support of a recusal motion. *Municipal Publications v. Court of Common Pleas, et al.*, 489 A.2d 1286 (Pa. 1985). Prior prosecutorial participation in a particular matter is not a *per se* basis for recusal "[a]bsent some showing

1. The complete factual and procedural history are set forth in the Commonwealth's petition under Rule 1702(d).

of prejudgment or bias[.]" *Commonwealth v. Abu-Jamal*, 720 A.2d 121, 124 (Pa. 1998), *quoting Commonwealth v. Darush*, 459 A.2d 727, 731 (Pa. 1983). *See also Commonwealth v. Jones*, 663 A.2d 142, 145 (Pa. 1995) ("recusal is . . . unwarranted where . . . there has been no allegation or showing of any specific prejudgment or bias against petitioner").

Argument

Defendant complains that, as District Attorney of Philadelphia 26 years ago in 1986, Justice Castille "personally authorized his office to seek the death penalty in this case" in the form of a handwritten note addressed to the then-chief of the Homicide Unit of the D.A.'s office stating "Approved to proceed on the death penalty" (recusal motion, ¶2, emphasis and punctuation omitted). This claim is indistinguishable from that in *Commonwealth v. Rainey*, 912 A.2d 755, 757-758 (Pa. 2006) (recusal opinion of Justice Castille), in which Rainey protested that Justice Castille had "decided to seek the death penalty" in his case. There, Justice Castille held that this was not a valid basis for his recusal, explaining that, as the District Attorney, his "formal approval of such recommendations from my assistants, recommendations approved at all levels in the chain of command, simply represented a concurrence in their judgment that the death penalty statute applied, *i.e.*, that one or more of the statutory aggravating circumstances set forth in the Sentencing Code, *see* 42 Pa.C.S. § 9711(d), existed, and nothing more."

Since defendant does not even discuss this holding of Rainey anywhere in his petition (strangely, since his

counsel, Billy Nolas, Esquire, was also Rainey's counsel), he fails to distinguish that controlling case. His argument that his claim has uniquely compelling force because the above notation is "handwritten" (recusal motion, ¶27) simply makes no sense. Regardless of how it was transmitted, the notation was a routine ministerial act inherent in the duties of the District Attorney, and not a sign of some form of personal animosity toward defendant on the part of Justice Castille. Moreover, even if a greater level of involvement in the case had existed on Justice Castille's part as District Attorney (though it does not), it still would not be disqualifying. In Commonwealth v. Darush, the offender was tried before a judge who had been the District Attorney when the offender was arrested and held for court; before assuming the bench, the judge had actually prosecuted the offender on unrelated charges, and had personally interviewed a witness who was later the primary witness in the case over which the judge presided. Nonetheless, this Court held that the judge acted properly in declining to recuse himself because "the record [was] barren of facts showing the trial judge had any actual knowledge of, or participation in, the investigation of the offense." This claim clearly fails.

Defendant contends that Code of Judicial Conduct, Canon 3(C)(1)(b), requires recusal (recusal motion, ¶23), but that provision "creates no right of recusal on behalf of litigants, but merely prescribes standards by which judges should exercise their discretion in ruling upon questions of recusal. The ultimate decision is vested within the sound discretion of the jurist whose recusal is sought." *Commonwealth v. Williams*, 732 A.2d 1167, 1174 (Pa. 1999).

Appendix J

According to defendant, his quotes (or purported quotes; none of this material is of record) of alleged newspaper stories from 1993 establish that Justice Castille's election campaign for a position as Justice of the Supreme Court "stressed his record as Philadelphia's District Attorney." Specifically, he alleges that Justice Castille's campaign referenced his having "'put 45 people on death row,' one of whom is [defendant]." Defendant also quotes parts of news articles that purport to quote Justice Castille (recusal motion, ¶6). But news stories are not evidence of anything. *See New Haven Inclusion Cases*, 399 U.S. 392, 450 (1970) ("Both sides point to newspaper articles in support of their arguments. None of this is record evidence, and we do not consider it"); *Commonwealth v. Ngow*, 652 A.2d 305, 306 (Pa. 1995) (conviction reversed for insufficient evidence because proof "may not consist of what one hears on the news"; contrasting "evidence" with "mere conjecture based on anecdotes and newspaper articles"); *Commonwealth v. Collins*, 957 A.2d 257, 270 (Pa.2008) (affirming court's exclusion of testimony of witness who learned of the alleged fact "only from newspapers and from people in the community" and not from personal knowledge). Further, none of what defendant purports to quote (and in fact, not even the unverified text he purports to quote specifically mentions him) even arguably tends to establish prejudgment or bias in his own case. *Commonwealth v. Jones*, 663 A.2d at 145.

Defendant complains that his counsel has been criticized for acting in bad faith for making false statements in opinions denying similar recusal requests in the past (recusal motion, ¶9). But while Chief Justice Castille has at times used unambiguous language, most recently in his

concurring opinion in *Commonwealth v. Spotz*, 18 A.3d 244 (Pa. 2011), to describe the abusive tactics of the attorneys at the Federal Community Defender Organization (FCDO), including present defense counsel, there is nothing remotely improper about that. The majority opinion in that case was joined by the entire Court except Justice Eakin (who had recused) and Justice Saylor (who separately concurred), who in fact recommended referring FCDO counsel to the disciplinary board. What defendant's counsel apparently fails to appreciate is that each frivolous claim advanced by him is a facial violation of the Rules of Professional Conduct. *See* Pa.R.P.C. 3.1 (counsel "shall not bring or defend a proceeding, *or assert or controvert an issue therein*, unless there is a basis for doing so that is not frivolous") (emphasis added); *see also McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 436 (1988) ("Neither paid nor appointed counsel may ... consume the time and the energies of the court or the opposing party by advancing frivolous arguments"). Moreover, Justice McCaffery joined Chief Justice Castille's concurring opinion in *Spotz* its entirety; Justice Orie Melvin joined part II of that concurring opinion, which called for reforms in light of "rampant abuses in this case and other cases"; and Justice Saylor, as already noted, filed a separate concurring opinion reiterating his prior support for some of Chief Justice Castille's observations and recommending that the conduct of the FCDO attorneys be referred to the Disciplinary Board for investigation. In short, if condemnation of defense counsel's inappropriate tactics warranted recusal, Justice Eakin would be left alone to decide this case by himself.

But of course, defendant's argument is wrong. Given this Court's role as both a court of last result and the

ultimate arbiter of attorney discipline in Pennsylvania, it can and *must* police attorney-misconduct and admonish or formally discipline lawyers who serially or egregiously violate the Court's rules or the Rules of Professional Conduct. When the Court or its constituent members fulfill that duty, they are not – and cannot reasonably be construed – as acting out of personal animosity toward the attorneys they sanction. Instead, they are merely fulfilling the Court's constitutional mandate. Accordingly, no reasonable observer would believe the Justices of this Court to be incapable of fairly adjudicating the cases of attorneys whose misconduct they have noted and condemned. Indeed, any such false impression would easily be dispelled, as all of the members of this Court, including Chief Justice Castille, have voted to grant relief to clients of the FCDO in many cases.[2] It also bears noting that, since this is a Court of last resort, there would be no one to replace Chief Justice Castille if he were to recuse himself in cases involving the FCDO generally or Mr. Nolas in particular, an outcome that would do nothing to advance the interests of capital offenders or the administration of justice. *See Commonwealth v. Rainey*, 912 A.2d at 758, and the cases cited therein.

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2. *E.g.*, *Commonwealth v. Smith*, 995 A.2d 1143 (Pa. 2010); *Commonwealth v. Sattazahn*, 952 A.2d 640 (Pa. 2008); *Commonwealth v. Miller*, 951 A.2d 322 (Pa. 2008) (*per curiam*); *Commonwealth v. Williams*, 950 A.2d 294 (Pa. 2008); *Commonwealth v. Gibson*, 925 A.2d 167 (Pa. 2007); *Commonwealth v. Sneed*, 899 A.2d 1067 (Pa. 2006); *Commonwealth v. May*, 898 A.2d 559 (Pa. 2006); *Commonwealth v. Zook*, 887 A.2d 1218 (Pa. 2005); *Commonwealth v. Moore*, 860 A.2d 88 (Pa. 2004); *Commonwealth v. Chambers*, 807 A.2d 872 (Pa. 2002); *Commonwealth v. Strong*, 761 A.2d 1167 (Pa. 2000).

There also is no support for defendant's claim under the law of due process.[3] The United States Supreme Court recently revisited the legal landscape relating to the due process aspects of judicial recusal in *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252 (2009). That case held that a state appellate judge was required, as a matter of federal due process, to recuse himself from an appeal involving a corporation whose president had contributed a substantial amount to his election campaign. The *Caperton* decision broke no new constitutional ground, and emphasized that the factual circumstances there were "extraordinary." 129 S.Ct. at 2265. *Compare, e.g., Tumey v. Ohio*, 273 U.S. 510 (1927) (judge, by virtue of fact that he also served as town mayor, received portion of fees and costs assessed to defendant in event of conviction); *Ward v. Monroeville*, 409 U.S. 57 (1972) (similar, except that fines imposed by mayor-judge went to town treasury); *In re Murchison*, 349 U.S. 133 (1955) (judge presided at hearing in case in which he previously had served as *de facto* grand juror); *Caperton*, 129 S.Ct. at 2257 (party to case had donated more than $3 million to judicial campaign of state justice who provided decisive vote reversing verdict of more

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3. Defendant's alternative argument, that recusal is somehow required by the Eighth Amendment, is legally incoherent. The Eighth Amendment, which prohibits "cruel and unsual punishment," by definition is only implicated by the infliction of punishment. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994). Thus, it is unsurprising that there is no authority, and defendant does not cite any, supporting the conceit that recusal – particularly recusal of an *appellate* judge — is governed by the Eighth Amendment. Defendant's punishment was ordained 26 years ago by the jury; whatever decision Chief Justice Castille and the other members of the Court issue in this case will not itself constitute punishment.

than $50 million against donor). But defendant's counsel and Chief Justice Castille have no personal relationship. Their interactions have occurred entirely within the scope of their professional capacities. Thus, this case does not approach the "outer boundaries" patrolled by the Due Process Clause. *See Commonwealth v. Beasley*, 937 A.2d 379, 380-81 (Pa. 2007) (recusal opinion of Castille, J.) (rejecting recusal motion wherein defense counsel attempted to bootstrap due process claim to argument that recusal was required by the Code of Judicial Conduct); *Commonwealth v. Williams*, 732 A.2d 1167, 1174 (Pa. 1999) (rejecting claim that trial counsel provided ineffective assistance by not seeking then-Justice Castille's recusal on due process grounds). *See also Johnson v. Carroll*, 369 F.3d 253 (3d Cir. 2004) (explaining heightened requirements for claim that recusal was required on due process grounds); *Rollins v. Horn*, 2005 WL 1806504, *44 (E.D. Pa. Jul. 26, 2005) (unpublished) (rejecting argument that then-Justice Castille's denial of recusal motion resulted in due process violation).

There is nothing new in the FCDO's latest in a series of petitions seeking the recusal of Chief Justice Castille. Rather, the recusal motion – much like defendant's untimely third PCRA petition – only recycles old claims that have already failed in the past. It should be denied.

Respectfully submitted,

Hugh J. Burns, Jr.
Chief, Appeals Unit

APPENDIX K — MOTION TO RECUSE CHIEF JUSTICE CASTILLE, DATED OCTOBER 1, 2012

SUPREME COURT OF PENNSYLVANIA

No. 163 EM 2012

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

TERRANCE WILLIAMS,

Respondent.

RESPONDENT'S MOTION TO RECUSE CHIEF JUSTICE CASTILLE

Respondent Terrance Williams, through counsel, respectfully moves for recusal of Chief Justice Ronald D. Castille from the instant proceedings. In support of this motion, Mr. Williams states as follows:[1]

1. Chief Justice Castille was the District Attorney for Philadelphia from January 1, 1986 until March 12, 1991.

2. Chief Justice Castille *personally authorized his Office to seek the death penalty in this case,* hand-writing

1. All emphasis herein is supplied unless otherwise indicated.

the following on a memorandum to Mark Gottlieb, Chief of his Office's Homicide Unit, which was introduced as an exhibit during the recent PCRA evidentiary hearing:

> Mark,
> Approved to proceed on the Death Penalty.
> */s/* Ronald D. Castille

PCRA Evidentiary Hearing Exhibit P-1, Memorandum to Mark Gottlieb, Chief, Homicide Unit, page 2 (dated 11/21/86) (appended as exhibit A); see also NT *9120112* (a.m.) at 11 (trial prosecutor Andrea Foulkes identifies Chief Justice Castille's signature on this document as authorizing the approval to proceed on the death penalty).

3. Chief Justice Castille was the District Attorney throughout the trial, capital sentencing, post-trial, and direct appeal proceedings in this case.

4. On direct appeal in Mr. Williams' case, the Philadelphia District Attorney's Office filed a Brief in the Pennsylvania Supreme Court, asking the Court to affirm Mr. Williams' convictions and death sentence. Then-District Attorney Castille is identified as one of the listed counsel for the Commonwealth on the cover and signature page of the Brief (appended as exhibit B).

5. In the current PCRA proceedings, evidence was introduced that, on June 23, 1988, trial prosecutor Foulkes wrote a letter to the Pennsylvania Board of Probation and Parole on behalf of Marc Draper, a key Commonwealth witness at Mr. Williams' trial. See PCRA

Evidentiary Hearing Exhibit P-15 (appended as exhibit C). The letter asks the Board to "consider [Mr. Draper's] cooperation ... when determining his eligibility for parole or commutation," and notes that this recommendation from the prosecutor was a "benefit or promise conveyed to" Mr. Draper in exchange for his testimony against Mr. Williams. *Id.* at 2. The trial prosecutor testified at the recent PCRA hearing that this promise to the Commonwealth's witness was not disclosed to the defense at trial. In her PCRA ruling, Court of Common Pleas Judge Sarmina cited this undisclosed inducement, among several other items of evidence, as evidence demonstrating that the trial prosecutor suppressed exculpatory evidence, played "fast and loose" with the truth, "had no problem disregarding her ethical obligations," and "took unfair measures to win." NT 9/28112 at 37, 39 45. Although Chief Justice Castille is not the signatory of the letter, the letter is written on the official letterhead of the Philadelphia District Attorney's Office and the sole name on the letterhead is "Ronald D. Castille, District Attorney." If for no other reason than the appearance of impropriety, Respondent respectfully suggests that recusal is appropriate for this reason as well.

6. In 1993, Chief Justice Castille campaigned for a position as a Justice on the Pennsylvania Supreme Court. His election campaign stressed his record as Philadelphia's District Attorney and, in particular, emphasized then-District Attorney Castille's pursuit of capital punishment and that, as District Attorney, he "put 45 people on death row," one of whom is Terrance Williams, Respondent on the pending Commonwealth motion to vacate the stay of execution. Examples include:

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* "Castille had campaigned as the law-and-order candidate, airing television commercials portraying [his opponent] as being soft on crime." Lisa Brennan, "Republicans Win Court Seats," LEGAL INTELLIGENCER (Nov. 4, 1993) (available on Westlaw, 11/4/1993 TLI l);

* "Castille, a former Philadelphia district attorney, had campaigned as the self-proclaimed law-and-order candidate, airing television commercials portraying his Democratic opponent as soft on crime." Associated Press, "Castille Wins Top Court Seat," ALLENTOWN MORNING CALL (Nov. 3, 1993) (available on Westlaw, 1993 WLNR 1864290);

* "Castille ... campaigned as the tough-as-nails scourge of criminals .... Castille's career as Philadelphia's district attorney, where he built a reputation as a law-and-order crime buster, thrust him in the public eye." Katharine Seelye, "Castille Defeats Nigro for Seat on Supreme Court," PHILADELPHIA INQUIRER (Nov. 3, 1993) (available on Westlaw, 1993 WLNR 1995447);

* "Castille [ran] a law-and-order campaign, touting his 45 death-penalty convictions and saying [his opponent] was soft on crime .... 'My campaign was basically that I've spent 20 years in law enforcement as a prosecutor, and the citizens want somebody who's tough on crime. My record's

been just that,' Castille said early this morning." Tim Reeves, "Castille Leads GOP Sweep of Courts," PITTSBURGH POST-GAZETTE (Nov. 3, 1993) (available on Westlaw, 1993 WLNR 2163040);

* "[W]hen he is asked why he wants to serve on the Supreme Court, what qualifies him, why voters should support him, he starts with his experience in Vietnam, works up to his record as Philadelphia district attorney and caps his pitch by declaring that he put 45 murderers on death row. Because he served in combat and as a prosecutor, he says, he is a proven law-and-order guy, tough on crime, eats nails for breakfast." "Castille used his first television ads to attack [his opponent], saying [his opponent] was lenient on drug dealers .... Castille's TV spots conclude: 'If you are looking for a law-and-order guy- Ron Castille. He put 45 murderers on death row and has been endorsed by the over 36,000 professional police officers in Pennsylvania.'" Katharine Seelye, "Castille Emphasizes Law-and-Order Image," PHILADELPHIA INQUIRER (Oct. 21, 1993) (available on Westlaw, 1993 WLNR 1992136);

* "Castille ... hopes a law-and-order message, coupled with name recognition in southeastern Pennsylvania, will help him win .... 'When I start talking about court reform, people's eyes glaze over,' he said. 'When I tell them about (my)

sending criminals to death row or how I fought the Mafia in Philadelphia, then they're interested.'" Frank Reeves, "Castille Preaches Law-and-Order Message to Voters, PITTSBURGH POST-GAZETTE (Oct. 18, 1993) (available on Westlaw, 1993 WLNR 2134084);

* "Castille and his prosecutors sent 45 people to death row during their tenure, accounting for more than a quarter of the state's death row population. Castille wears the statistic as a badge. And he is running for the high court as if it were exclusively the state's chief criminal court rather than a forum for a broad range of legal issues . ... Castille talks about bringing a prosecutor's perspective to the bench." Tim Reeves, "High Court Hopefuls Pressing for Change," PITTSBURGH POST-GAZETTE (Oct. 17, 1993) (available on Westlaw, 1993 WLNR 2117584);

* "Castille's [TV] ad portrays [his opponent] as soft on crime and offers Castille, a former Philadelphia district attorney, as the 'law-and-order' alternative .... The ad ... says Castille has put 45 people on death row and has received the endorsement of more than 36,000 police officers in the state." "Nigro, Castille Begin TV Campaign," LEGAL INTELLIGENCER (Oct. 14, 1993) (available on Westlaw, 10/14/1993 TLI 3); Katharine Seelye, "Judicial Candidates Begin Courting the TV Audience," PHILADELPHIA

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INQUIRER (Oct. 12, 1993) (available on Westlaw, 1993 WLNR 1991534) (same);

* "Some candidates ... skated perilously close to saying how they might be expected to rule on issues that could come before them as judge. Take, for example, Supreme Court Justice-elect Ron Castille - who, while pursuing a job requiring him to hear death-penalty appeals, bragged that he sent 45 people to death row when he was a prosecutor." Lynn Marks & Ellen Kaplan, "Disorder in the Courts," PITTSBURGH POST-GAZETTE (Nov. 14, 1993) (available on Westlaw, 1993 WLNR 2150772);

* Candidates "Castille, Nigro and Surrick are aware that special interest groups capable of giving money to control votes would love to hear their positions on gun control, abortion, the death penalty or any hot issue of the day. Under the current [legal] restrictions, Castille says if candidates take positions then they'll have to recuse themselves from any decisions in those cases. 'There's really no solution to it,' Castille says. 'You ask people to vote for you, they want to know where you stand on the death penalty. *I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get the hint.*'" Lisa Brennan, "State Voters Must Choose Next Supreme Court Member," LEGAL INTELLIGENCER (Oct. 28, 1993) (available on Westlaw, 10/28/1993 TLI 1).

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7. Chief Justice Castille was elected and assumed his position on the Pennsylvania Supreme Court in January 1994.

8. Since Chief Justice Castille assumed the Bench, undersigned counsel's office has sought Chief Justice Castille's recusal from several Philadelphia capital PCRA appeals, arguing that recusal was appropriate because of Chief Justice Castille's role as Philadelphia's District Attorney during some earlier stage of the case. Chief Justice Castille denied recusal in those cases. *See,e.g.*, *Commonwealth v. Porter*, 35 A.3d 4, 29 (Pa. 2012) (recusal opinion of Castille, C.J.); *Commonwealth v. Beasley*, 937 A.2d 379 (Pa. 2007) (recusal opinion of Castille, J.); *Commonwealth v. Rainey*, 912 A.2d 755 (Pa. 2006) (recusal opinion of Castille, J.); *Commonwealth v. Jones*, 663 A.2d 142 (Pa. 1995) (recusal opinion of Castille, J.); *Commonwealth v. Williams*, 732 A.2d 1167, 1174 (Pa. 1999).

9. Chief Justice Castille's most recent opinions denying recusal motions based in part on his earlier role as District Attorney suggest and/or expressly state that undersigned counsel's office is acting in bad faith by seeking Chief Justice Castille' s recusal. *See, e.g.*, *Rainey*, 912 A.2d at 759 (accusing counsel of"reckless disregard" and writing "scurrilously"); *id.* at 760 (stating that counsel's "unsupported 'factual' averrnents are utterly false ... "); *id.* at 760 n.3 ("It bears noting, given the nature of the instant allegations, that the attorney's oath of office includes a pledge to 'use no falsehood.' ... In addition, the Rules of Professional Conduct prohibit

lawyers from knowingly making a false statement of material fact or law to a tribunal.. .. "); *id.* at 761 ("I certainly hope that the Chief Defender did not personally review and approve as a 'policy' matter the falsehoods that are the basis for [counsel's] argument contained herein."); *id.* at 761 (stating that counsel's "allegations are as bereft of factual support as they are distressingly unmindful of his sworn duties as a lawyer and officer of this Court"); *id.* at 761 ("reckless nature of [counsel's] baseless allegation"); Beasley, 937 A.2d at 381 (accusing counsel of "false statements," "mischaracterizations" and "ethical lapses"); *id.* at 3 82 (asserting that counsel made "scandalous misrepresentations in Rainey"); *id.* at 382 (asserting that counsel's actions in Rainey were "unethical representation"); *id.* at 383 (suggesting that counsel "betray[ed] contempt for ethical standards" and "contempt for [the] court"); *id.* at 383 (asserting that counsel is in "dogged pursuit of a poor reputation"); Porter, 35 A3d at 33 (rejecting counsel's "repetitious complaint that my former position as the elected District Attorney of Philadelphia County requires my recusal" for reasons stated in "multiple prior opinions" (citing Beasley)); *id.* at 34 (asserting that counsel's requests for Chief Justice Castille's recusal reflect counsel's "perverse worldview"); *id.* at 34 (suggesting that counsel's recusal motions violate "professional ethical obligations").

ARGUMENT

10. Chief Justice Castille's recusal from this matter is appropriate under Pennsylvania law, the Due Process Clause of the Fourteenth Amendment to the United States

Constitution, and the Eighth Amendment to the United States Constitution.

11. Moreover, should Chief Justice Castille decline to recuse himself, the Due Process Clause and the Eighth Amendment require that the recusal issue be considered and decided by the full Court.

I. DUE PROCESS AND THE EIGHTH AMENDMENT REQUIRE CHIEF JUSTICE CASTILLE'S RECUSAL

12. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico*, Inc., 446 U.S. 238, 242 (1980); *accord In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). This due process right "has been jealously guarded by [the United States Supreme] Court" because it "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Marshall*, 446 U.S. at 242 (citation and internal quotation marks omitted). And this due process requirement takes on even greater significance in a capital case, because of the Eighth Amendment's heightened due process requirements. *E.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

13. A fair, "impartial and disinterested tribunal," as required by the Eighth and Fourteenth Amendments, requires not just "an absence of actual bias" - there must

not be "even the probability of unfairness," and "'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). As the United States Supreme Court most recently stated in *Caperton v. Massey Coal Co.*, 556 U.S. 868 (2009): "Under our precedents there are *objective standards* that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The Supreme Court further explained:

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

Caperton, 556 U.S. at 883.

14. These "objective standards" require recusal when the situation "offer[s] a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused." *Caperton*, 556 U.S. at 878 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)); *id.* at 879 (same).

15. While the "possible temptation" standard "cannot be defined with precision," *Murchison*, 349 U.S. at 136; *Caperton*, 556 U.S. at 879, it applies here, where Chief Justice Castille was the District Attorney responsible for prosecuting Mr. Williams at trial and on direct appeal; where Chief Justice Castille in a handwritten note *personally authorized* his Office to seek the death penalty for Mr. Williams; where Chief Justice Castille's name appears as counsel for the Commonwealth on the direct appeal brief seeking affirmance of Mr. Williams' convictions and death sentence; where the claims presented in this case include claims that the District Attorney's Office, then headed by Chief Justice Castille, violated due process under Brady and related cases by suppressing exculpatory information and presenting false and misleading information to the jury; where Chief Justice Castille' s name appears as counsel for the Commonwealth on a letter that is part the evidence litigated in the Court of Common Pleas in this case; where Chief Justice Castille's campaign for judicial office highlighted his obtaining the death penalty in a number of capital cases, including Mr. Williams' case; and where Chief Justice Castille appears to have expressed hostility to undersigned counsel's office.

16. Respondent respectfully submits that, considering "all the circumstances of this case, due process requires recusal." *Caperton*, 556 U.S. at 872. Moreover, consideration of some of the circumstances individually highlights why due process requires Chief Justice Castille's recusal.

17. The Supreme Court's finding of a due process violation in *Murchison* supports Respondent's argument that due process does not allow Chief Justice Castille's participation as a judge in a case where he was the District Attorney who was responsible for Mr. Williams' prosecution throughout trial and direct appeal, and personally authorized his Office to seek the death penalty.

18. In *Murchison*, the judge who presided at trial had conducted "'one man grand jury' proceedings" that resulted in the defendant's indictment. 349 U.S. at 136. The Supreme Court held:

> Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

Id. at 137. *See also Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) (describing *Murchison's* holding that the ".judge violated due process by sitting in the criminal trial of defendant whom he had indicted").

19. Here, should Chief Justice Castille participate, the due process violation will be even more clear than it was in *Murchison*. While the *Murchison* judge returned the indictment while acting as a *judge* and, thus, did "not likely have all the zeal of a prosecutor," *id.* at 137, then-District Attorney Castille *was the prosecutor who personally authorized his Office to seek the death penalty* in Terrance Williams' case. Due process will thus be violated if Chief Justice Castille now assumes the role of judge. And the due process requirement for Chief Justice Castille's recusal is even more applicable because the issues in this case, as the Court of Common Pleas has found, involve the violation of Mr. Williams' due process rights (by suppressing exculpatory information and presenting misleading information to the jury) by the District Attorney's Office that Chief Justice Castille headed at that time. If ever there was a case that "offer[s] a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused," *Caperton*, 556 U.S. at 878, this is it.

20. The above-described reports of Chief Justice Castille's judicial election campaign further highlight why it would violate due process for Chief Justice Castille to sit in judgment here. The *Caperton* decision made clear that judicial elections can create circumstances under which due process requires judicial recusal. Former United States Supreme Court Justice John Paul Stevens has stated: "A campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a candidate from sitting in criminal cases." John Paul Stevens, *Opening Assembly Address, AB.A.*

Ann. Meeting, 12 ST. JOHN'S J. LEGAL COMMENT. 21, 30-31 (1996). *See also* Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 Ariz. L. Rev. 317, 319 (2002) (under due process analysis required by *Caperton*, "tough-on-crime elective judges should recuse themselves from all criminal cases"). But such a sweeping rule is not necessary here. Chief Justice Castille's campaign was not just "toughon-crime" or pro-death penalty, it was based in part on his record as District Attorney of putting people on death row, *one of whom is Mr. Williams.* Under these circumstances, at least, due process counsels Chief Justice Castille's recusal.

21. Chief Justice Castille' s antagonistic attitude toward undersigned counsel's office, as evidenced by statements in his opinions denying prior recusal motions, also supports this motion for recusal on due process grounds. *See, e.g.*, *Caperton*, 556 U.S. at 881 (due process requires recusal when judge "becomes 'embroiled in a running, bitter controversy" "with litigant (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971)));*Commonwealth v. Dougherty.* 18 A.3d 1095, 1096 (Pa. 2011) (Baer, J., concurring) (explaining that when judge "chastised an assistant district attorney who requested her recusal ... , this Court determined that such remarks increased the appearance of impropriety, and, indeed, necessitated the reversal of the judge's refusal to recuse" (citing *Commonwealth v. White*, 910 A.2d 648 (Pa. 2006)); *id.* at 1097 ("to attack counsel personally for requesting recusal, when the law requires such motions to be put forth before the judge whose actions are in question in

the first instance, is obviously inappropriate"); *Offutt v. United States*, 348 U.S. 11, 17 n.3 (1954) (recusal required where judge criticized counsel as giving a "disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the profession; and I, as a member of the legal profession, blush that we should have such a specimen in our midst"); *Fairley v. Andrews*, 423 F.Supp.2d 800, 821 (N.D. Ill. 2006) (recusal required where judge made comments that could have been interpreted as prejudgment of the case against defendants, "especially in the wider context of the Court's negative interactions with Defendants' counsel"); *United States v. Meyerson*, 677 F.Supp. 1309, 1315 (S.D.N.Y. 1988) (judge recused self because judge "resent[ed] unsupported assertions" and "tactics" of counsel); *Marshall v. Georgia Pac. Corp.*, 484 F.Supp. 629, 631 (E.D. Ark. 1980) (recusal where reasonable observer "could assume that the court would view [statements by counsel] with considerable displeasure").

22. For all of the above-stated reasons, the Due Process Clause and the heightened due process requirements of the Eighth Amendment make Chief Justice Castille's recusal appropriate in this case.

II. PENNSYLVANIA LAW REQUIRES CHIEF JUSTICE CASTILLE'S RECUSAL

23. Pennsylvania's Code of Judicial Conduct requires recusal when a judge's "impartiality might reasonably be questioned." *Id.*, Canon 3(C)(l). *See also Joseph v. Scranton Times*, 987 A.2d 633, 634 (Pa. 2009) (per curiam)

("appearance of impropriety" requiring recusal where "there are factors or circumstances that may reasonably question the jurist's impartiality in the matter"; "There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings. A trial judge should not only avoid impropriety but must also avoid the appearance of impropriety."). For the reasons already stated, Chief Justice Castille's "impartiality might reasonably be questioned" in this case; thus, recusal is required under Pennsylvania law.

24. Moreover, Pennsylvania's Code of Judicial Conduct specifically identifies the following as an example of when a judge's "impartiality might reasonably be questioned" and, thus, when his or her recusal is required - when the judge "served as a lawyer in the matter in controversy." *Id.*, Canon 3(C)(l)(b). In *Commonwealth ex rel. Allen v. Rundle*, 189 A.2d261, 262 (Pa. 1963), the Court held that a judge who was the district attorney at the time the defendant was indicted must recuse himself from defendant's post-conviction proceedings. The same is true for Chief Justice Castille here, since he was the District Attorney throughout the trial and direct appeal proceedings, and personally authorized seeking death. *See also United States v. Amerine*, 411 F.2d 1130, 1134 (6th Cir. 1969) (applying similar language from 28 U.S.C. § 455 (1964); recusal of judge who was United States Attorney for the district in which defendant was tried at the time when complaints were issued against defendant "is not a matter for the exercise of [the judge's] discretion but is unconditional and absolute"); *United States v. Vasilick*,

160 F.2d 631, 632 (3d Cir. 1947) (same for judge who was United States Attorney when indictment was returned against defendant).

25. In Jones, Chief Justice Castille stated that he was exempted from Canon 3(C)(l)(b) by the Commentary thereto: "A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection." *Jones*, 663 A.2d at 146 (quoting Commentary to Canon 3(C)(l)(b)). But Chief Justice Castille's role as the Commonwealth's lawyer in this case did not arise through mere "association with other lawyers" in the District Attorney's Office. Instead, as the District Attorney himself, he was charged by law with representing the Commonwealth's interests in Mr. Williams' case. While one might argue that one *assistant* district attorney "does not necessarily have an association with other" *assistant* district attorneys in the same Office, it cannot reasonably be asserted that *the* District Attorney does not "have an association" with the lawyers under his command. The District Attorney is not merely a "lawyer in a governmental agency" - he is the *head* of that agency and the actions of that agency are his responsibility *as a matter of law. See* 16 Pa.C.S. § 1420 ("the district attorney may appoint such number of assistants, learned in the law, *to assist him* in the discharge of his duties"); Commonwealth ex rel. *Specter v. Bauer*, 261 A.2d 573, 57 5 (Pa. 1970) ("district attorneys in this Commonwealth have the power - and the duty- to represent the Commonwealth's interests in the enforcement of its criminal laws"); *id.* at 576 (district attorney is the "sole public official charged with the legal

responsibility of conducting in court all criminal and other prosecutions, in the name of the Commonwealth" (internal quotation marks omitted)); *Commonwealth v. Malloy*, 450 A.2d 689, 691-92 (Pa.Super. 1982) ("the district attorney is charged with the responsibility for the investigation and prosecution of any complaint which he approves"; "the district attorney's function is to represent the Commonwealth in criminal prosecutions. In the capacity as the Commonwealth's attorney, the district attorney has traditionally fulfilled the obligation of investigation and prosecution of crime by initially evaluating complaints to determine whether a charge should be brought against a suspect. 'A District Attorney has a general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case.'").

III. THIS CASE IS DIFFERENT FROM PRIOR CASES IN WHICH CHIEF JUSTICE CASTILLE DENIED RECUSAL MOTIONS

26. In prior cases where Chief Justice Castille denied recusal motions grounded in part upon his former position as Philadelphia's District Attorney, Chief Justice Castille relied upon the movant's inability to provide evidence that Chief Justice Castille was "personally involved" in the movant's prosecution. *See,e.g., Rainey*, 912 A.2d at 757 ("To the best of my knowledge and recollection, I was not personally involved in any pre-trial investigation of appellant [or] the charging decisions that were made in his case .... [Counsel] has pointed to nothing in the record

that demonstrates otherwise."); *Porter*, 35 A.3d at 33 (rejecting counsel's "repetitious complaint that my former position as the elected District Attorney of Philadelphia County requires my recusal, even though I had no actual involvement in appellant Porter's trial or direct appeal"); Beasley, 937 A.2d at 381 ("[T]o the best of my knowledge and recollection, I was not personally involved .... [Counsel] has pointed to nothing in the record that demonstrates otherwise.").

27. In this case, there is specific evidence of Chief Justice Castille's direct, personal involvement in this case - then-District Attorney Castille's *handwritten notation personally authorized his Office to seek death.* Thus, if personal involvement is required, it is established here.

28. In any event, the question of "personal involvement" is not dispositive under the objective standards that govern recusal matters. Even absent proof of "personal involvement," recusal would be required here, as a matter of Fourteenth Amendment Due Process and Eighth Amendment law, and under Pennsylvania law, for all of the reasons stated herein.

IV. IF CHIEF JUSTICE CASTILLE DECLINES TO RECUSE HIMSELF, THIS MATTER SHOULD BE REFERRED TO THE FULL COURT

29. In denying prior recusal motions in capital PCRA cases, Chief Justice Castille stated that, "[u]nder the existing practice of this Court, recusal has been a matter of individual discretion or conscience and only the jurist

being asked to recuse himself or herself may properly respond to such a request," *Jones*, 663 A.2dat 143 (citing *Commonwealth v. O'Shea*, 567 A.2d 1023, 1034 (Pa. 1989); *In re Crawford's Estate*, 160 A. 585, 587 (Pa. 1932)), and denied requests that the recusal motion be referred to the full court, *Porter*, 35 A.3d at 34.

30. Respondent Williams respectfully submits that this practice is inappropriate in light of the *objective* standards for recusal mandated by the Due Process Clause, *e.g.*, *Caperton*, 556 U.S. at 872 ("there are *objective standards* that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable'" (quoting *Withrow*, 4 21 U.S. at 4 7), and Pennsylvania's Code of Judicial Conduct, *e.g.*, Canon 3 (C)(l) (recusal required when "impartiality might *reasonably* be questioned").

31. To be sure, it is appropriate for a recusal motion to *first* be considered by the Justice to whom it is directed, since only that Justice can know ifthere are *subjective* factors that require his or her recusal. But that subjective inquiry is "just one step in the judicial process" of considering a recusal motion - if a Justice makes the subjective determination that he or she is not biased, the recusal inquiry must proceed to the *objective* inquiry that is appropriate under Due Process, the Eighth Amendment and Pennsylvania law. *Caperton*, 556 U.S. at 886 ("Justice Benjamin did undertake an extensive search for actual bias. But, as we have indicated, that is just one step in the judicial process; objective standards may also require recusal whether or not actual bias exists or can be

proved."). As the United States Supreme Court recently reiterated:

> The judge's own inquiry into actual bias ... is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

Caperton, 556 U.S. at 883.

32. As to the *objective* recusal inquiry, the Justice whose recusal is sought is no better able to decide, and arguably is less able, than the rest of the Court. Indeed, due process *requires* that the full Court decide the due process-based recusal issue, just as the full Court would decide any other Constitutional issue presented by a litigant.

33. Accordingly, should Chief Justice Castille decide that he is not inclined to recuse himself, the matter should be referred to the full Court for decision under the objective standards mandated by Due Process, the Eighth Amendment and Pennsylvania law.

34. At the very least, the Court should order full briefing and argument on this issue, which courts have recognized to be one of great importance. *See State*

v. Allen, 778 N.W.2d 863, 871-73, 880-83 (Wis. 2010) (plurality opinion) (calling for briefing and argument, in light of *Caperton*, on question of whether due process requires full Court review of single Justice's recusal decision); *U.S. Fidelity Ins. v. Catastrophic Claims*, 773 N.W.2d 243, 246-47 & n.12 (Mich. 2009) (opinion of Corrigan, J.) (same, noting that "former Michigan State Supreme Court Chief Justice Clifford Taylor [has stated] that *Caperton* 'has to mean that the challenged justice can't make the recusal decision alone'"); *id.* at 250 (calling for briefing and argument on question: "Does this Court's historical recusal practice - which permits each justice to decide motions for his or her recusal ... - comport with the Caperton Court's requirement for objective standards?"); *Fieger v. Gromek*, 373 Fed. Appx. 567, 572 (6th Cir. 2010) (holding that due process challenge to Michigan Supreme Court's practice of single justice consideration of recusal motions was mooted by that Court's adoption of the following "new disqualification rule": "In the Supreme Court, if a justice's participation in a case is challenged by a written motion ... , the challenged justice shall decide the issue and publish his or her reasons about whether to participate. If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing.").

Appendix K

CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated, Respondent respectfully prays:

1. that Chief Justice Castille recuse himself;

2. that, should Chief Justice Castille decline to recuse himself, this motion be referred to the full Court for decision; and that the full Court direct Chief Justice Castille's recusal.

Respectfully submitted,

LEIGH M. SKIPPER
Chief Federal Defender

BY:

/s
Shawn Nolan
PA Bar No. 56535
Billy H. Nolas
PA Bar No. 83177
Assistant Defenders
Federal Community Defender Office
for the Eastern District of
Pennsylvania
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(215) 928-0520
Counsel for Terrance Williams

APPENDIX L — EXCERPTS OF BRIEF FOR APPELLEE IN THE SUPREME COURT OF PENNSYLVANIA

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 98
E.D. APPEAL DOCKET 1987

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

TERRANCE WILLIAMS,

Appellant.

BRIEF FOR APPELLEE

Appeal from the Judgment of Sentence of the Court of Common Pleas, Trial Division, Criminal Section, of Philadelphia County, as of Information Nos. 2362-2367, August Term, 1984.

/s/_____
HUGH J. BURNS, JR.
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney

Appendix L

WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney

1421 Arch Street
Philadelphia, PA 19102

***

Appendix L

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Court to affirm the judgments of sentence.

Respectfully submitted,

/s/_____
HUGH J. BURNS, JR.
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney

APPENDIX M — LETTER FROM THE DISTRICT ATTORNEY'S OFFICE, DATED JUNE 23, 1988

DISTRICT ATTORNEY'S OFFICE
1421 Arch Street
Philadelphia, Pennsylvania 19102

June 23, 1988

Ronald D. Castille
District Attorney

Pa. Board of Probation and Parole
P.O. Box 1661
3010 N. Front Street
Harrisburg, Pennsylvania 17120

Re: *Inmate Marc Draper*

To Whom It May Concern:

At the request of the family of the above-named inmate, I am submitting the following information to them with instructions to forward it to you if and when this prisoner becomes eligible for parole or commutation of sentence.

Marc Draper was the co-defendant of Terrance Williams and, with Williams, conspired and acted to abduct, rob and beat to death 56 year old Amos Norwood, inside the Ivy Hill cemetery in the Mt. Airy section of Philadelphia. After tying the victim with his own clothes and beating him with car tools, the co-defendants took his money, credit cards and car, obtained more money and jewelry with the stolen goods in Atlantic City and

Philadelphia. Their spree was ended when credit card calls were traced by police to a third man who assisted the killers in obtained these credit card benefits.

Mr. Draper was arrested in his home and Williams fled the jurisdiction upon issuance of warrants. On the day of his arrest, Mr. Draper completely and thoroughly confessed his participation in this hideous crime without any promises or benefits offered to him. In addition, he volunteered additional information about his co-defendant's responsibility for the murder of 53 year old Herbert Hamilton in West Philadelphia six months earlier, which led to the arrest of Williams on that previously unsolved case. Draper offered to cooperated fully with the investigations and to testify truthfully in the prosecution of Williams in both homicide cases, resulting in Williams' conviction in the earlier killing of murder in the third degree (William's defense was that the killing was provoked by homosexual advances of the victim), and a verdict of murder in the first degree with the penalty of death by the jury in the Norwood case. In addition, Draper agreed to plead guilty to murder in the second degree, knowing that it brought a mandatory life sentence, without any promise of leniency or early release.

Although the heinous nature of the underlying crime cannot be minimized in any way, Mr. Draper has attempted to compensate significantly for his role in this matter. While it is true that he has benefitted by avoiding the death penalty for himself, I was well aware that during the pendency of prosecutions against Williams, Mr. Draper was visited regularly in Holmesburg prison by Williams himself, at the gates of Draper's protective custody area,

and by friends of Williams inside Draper's cell. Thus, Mr. Draper's security in prison was never certain, yet he continued without complaint in his cooperation with authorities to see that justice was served in all matters in which he had information or connection.

I never had any reason to doubt Mr. Draper's veracity and he never declined to answer the most difficult questions about his own culpability. Williams sent Mr. Draper letters in prison with alternative stories to feed the authorities and the court about their criminal activities. Mr. Draper passed that correspondence on to his father, a Philadelphia police officer, with instructions to give them to the prosecutor in preparation for trial. Those letters, in addition to his oral testimony, established a compelling case against Williams who had a frightening history for violent crimes.

Therefore, it is proper for you to consider the cooperation of this inmate when determining his eligibility for parole or commutation at some future date. That I provide you with the particulars of Mr. Draper's cooperation was the only benefit or promise conveyed to him in exchange for his complete truthful cooperation. I hope this information will be useful in your evaluations.

Yours very truly,

s/_____
ANDREA G. FOULKES
Assistant District Attorney
Homicide Unit

bbc: Mr. George Draper

APPENDIX N — ORDER OF THE COURT OF COMMON PLEAS - PHILADELPHIA COUNTY, GRANTING PENALTY-PHASE RELIEF, DATED SEPTEMBER 28, 2012

PHILADELPHIA COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

CP-51-CR-0823621-1984

COMMONWEALTH

v.

TERRANCE WILLIAMS

Sarmina, J.

ORDER

AND NOW, this 28th day of September, 2012, it is ORDERED that the stay of execution is GRANTED and a new penalty phase is ORDERED.

BY THE COURT:

/s/_____
M. Teresa Sarmina

APPENDIX O — TRANSCRIPT OF PROCEEDINGS OF COURT OF COMMON PLEAS - PHILADELPHIA COUNTY, DATED SEPTEMBER 28, 2012

[1]IN THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA COURT OF COMMON PLEAS - PHILADELPHIA COUNTY, CRIMINAL TRIAL DIVISION

CP-51-CR-0823621-1984
CP-51-CR-0907971-1984

COMMONWEALTH

v.

TERRANCE WILLIAMS

FRIDAY, 28 SEPTEMBER 2012
Courtroom 507
Criminal Justice Center
Philadelphia, Pennsylvania

BEFORE THE HONORABLE M. TERESA SARMINA, J.

***

[4]THE COURT: The court reporter has asked that everyone identify themselves for the record.

MR. NOLAS: Billy Nolas, Your Honor, on behalf of the Petitioner.

MR. MONTROY: Eric Montroy, Your Honor, on behalf of the Petitioner.

MR. NOLAN: Shawn Nolan, Your Honor, on behalf of Petitioner.

MS. GIVENS: Jennifer Givens, Your Honor, on behalf of Petitioner.

MR. EISENBERG: Ronald Eisenberg for the Commonwealth.

MS. GODFREY: Robin Godfrey on behalf the Commonwealth.

MS. NAHLER: Kari Nahler on behalf of the Commonwealth.

THE COURT: Thank you. Under our system of law, there are safeguards to guard against convictions or sentences that may be proper for a number of reasons.

The first level of review of a conviction and sentence is afforded a defendant through a direct appeal. At that [5]time, trial court error and missteps by the prosecutor, including prosecutorial misconduct, based on things that can be gleaned from the record of the trial are reviewed. After that stage of the proceedings, which can go as far as the U.S. Supreme Court, there is the opportunity for what is called a collateral challenge to the conviction, including that prior counsel rendered ineffective assistance.

This is a very technical area, and in Pennsylvania is governed by the Post Conviction Relief Act, also known as the PCRA.

Under the PCRA, all petitions for relief must be filed within one year of judgment becoming final.

Judgment of sentence becomes final at the conclusion for direct review.

This Court was assigned the petition of Terrance Williams for Post-Conviction Relief and for a stay of execution.

A review of that petition made it obvious that the judgment of sentence had become final decades ago.

[6] This Court made the decision to hear evidence from two witnesses in this case, the trial prosecutor regarding petitioner's two homicide trials, Miss Andrea Foulkes, as well as the Commonwealth's principal witness at both of those trials, Marc Draper.

Due to the time limitations involved, and due to the duty of the Court to make credibility determinations concerning the testimony to be provided, this Court made the unusual decision to direct that neither side would be permitted to speak to or prep the witnesses prior to them testifying.

The Court retrieved from Ms. Foulkes a CD that had earlier been provided to her by the District Attorney's

Office since it contained much more than what was necessary for her to review the decisions she made at the two trials.

It was apparent from her testimony here that she reviewed much more than just what occurred at trial, and she conceded as much. And I imply no wrongdoing on her part for having done that. She received that CD before the Court ever knew it [7] had been provided to her by the District Attorney's Office.

The Court also precluded the defense from providing to Mr. Draper the affidavit he had most recently provided to them, notwithstanding that they had told him they would send it. He had not had the opportunity to review any of his trial testimony before testifying here.

The Court also directed that Ms. Foulkes' trial files be brought to the Court's chambers, and that both sides would be permitted to review them there and mark any documents that they wanted to use in their examination of the witnesses.

Ms. Foulkes also had, and took, the opportunity to go through her files and to copy whatever she wanted.

Both sides were then given a copy of whatever she had copied.

Over this past weekend the Court also directed that the two Homicide files of the Philadelphia Police Department's Homicide Unit from 1984 were to be brought

to the courtroom so that both sides could search [8] through those to see if there was additional evidence that supported or contradicted the claims made by Petitioner.

The Court has taken these extraordinary measures because the Court is of the view that if Petitioner is to be executed, it should be because there is confidence that the verdict of death imposed by the jury in 1986 was what the word "verdict" means: To speak the truth.

The decision for a jury to make in a capital trial at the penalty phase is based on complicated instructions.

But, to grossly summarize, it is as follows:

To determine whether or not the aggravating circumstances that the Commonwealth case claims apply to the case exists. These are set by statute;

To determine whether the mitigating circumstances the defense claims applied to the case exists. There are enumerated areas; but, then, there is also a catch-all that provides for anything and everything about the defendant and about the [9] circumstances of the crime that would make the case less deserving of a death sentence. And, obviously, the aggravating circumstances are things that the Commonwealth believes would make it more deserving of a death sentence.

If the jury unanimously finds beyond a reasonable doubt that there are aggravating circumstances and no mitigating circumstances, then the jury must return a sentence of death.

Appendix O

If the jury unanimously finds beyond a reasonable doubt that there is one or more aggravating circumstance and any juror finds by a preponderance of the evidence that there is any mitigating circumstance, then the jury is to engage in a weighing, and is only to return a sentence of death where the jury concludes beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.

Here, the jury found no mitigating circumstances.

The cases are clear that a conviction based upon a lie cannot stand. So, it has been a critical determination for this [10] Court to decide what is the truth and what is not;

What it credible and what is not;

Who is to be believed and who is not.

In making its factual findings, the Court is free to believe some, all, or none of each of the witness's testimony.

Petitioner's first claim is that trial counsel failed to provide Constitutional effective assistance of counsel during the trial penalty phase.

He asserts that he was unfairly prejudiced when appellate counsel and the Pennsylvania courts were never given the opportunity to hear or rebut what the Commonwealth termed, quote, "anti-mitigation," closed quotes, evidence.

He alleges that the Third Circuit relied on this evidence in dismissing his habeas corpus petition in violation of the Superior Court's decision in the case of Cullen v. Pinholster, a 2011 case.

Petitioner fails to prove that this Court has jurisdiction over this claim, [11] and he cannot show that he was prejudiced, as the underlying issue was previously litigated. Therefore, this claim should not entitle petitioner to a stay of execution, or to any relief.

Petitioner fails to prove that this Court has jurisdiction to hear this PCRA claim under Section 9545 of Title 42 because this claim does not meet the criteria for one of the timeliness exceptions.

This claim does not involve governmental interference, nor does it involve newly discovered facts or recent retroactively-applied Supreme Court case law.

In fact, petitioner frames his argument as one of ineffectiveness of counsel.

The Pennsylvania Supreme Court noted in Bennett that, quote, An allegation of PCRA counsel's ineffectiveness could not be invoked as a newly-discovered fact for purposes of this subsection. We have steadfastly adhered to this principle. We firmly reject any such attempts to circumvent the one-year time limitation via claims of PCRA counsel ineffectiveness.

[12] This issue was, in fact, presented to the United States Supreme Court on a writ of certiorari which was

denied. Accordingly, this Court will not discuss this claim further.

As to petitioner's claim that the Commonwealth violated due process by suppressing evidence of Renee Rucker's crimen falsi convictions, the Court finds that counsel have failed to show that they could not have accessed this information at an earlier date with the exercise of due diligence and, therefore, this Court is without jurisdiction to entertain it. Additionally, the Court fails to see how the prejudice prong would be met.

Petitioner's claim that the Commonwealth failed to disclose impeachment evidence as to Marc Draper due to information he provided about a burglary he committed, which was orchestrated by Petitioner Williams, is meritless, as no reasonable defense counsel would have used that evidence.

As to the claim that there was a "deal" with Draper that was suppressed, the [13]Court finds that this claim could have been raised earlier by the exercise of due diligence, certainly as of the time of Draper's PCRA appending the 1988 letter from ADA Foulkes was filed; and, accordingly, this is untimely.

I would note that it seems like it could have been a viable claim under at least the first prong of Napue and Giglio, and might have satisfied the prejudice prong meriting a new trial.

This Court has not addressed, at this juncture, the claims relative to his conviction in the Hamilton case, but

at first blush thinks it may be untimely. I have focused my attention on the capital matter, which is of urgency given the time constraints and the date set for the execution of petitioner.

The Court finds that the petitioner is entitled to a stay of execution under Section 9545(c), given that petitioner has met his burden under Morris II to, quote, demonstrate:

One, that all the requirements of [14] this subchapter have been met;

Two, that there is a pending stay application;

And, Three, that there is a strong likelihood of success on the merits.

Petitioner exceeded the strong likelihood threshold, demonstrating actual success on the merits with respect to the penalty phase.

Under section 9545(c), petitioner needed to demonstrate that he met all the requirements of this subchapter.

Both Morris I and Morris II make it explicitly clear that the above language incorporated the jurisdictional provision of Section 9545(b) into the analysis of granting a stay of execution.

For this Court to have jurisdiction, that is, the power or authority to reach the merits of his claims, petitioner

must have established that his claims fall under at least one of three narrowly defined exceptions to the PCRA.

Here, petitioner maintained that he had met the following two exceptions:

[15] One, which is actually Subsection i, that the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth, or the Constitution or laws of the United States;

And, ii, that the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence.

This Court has jurisdiction in this case, given that petitioner demonstrated governmental interference pursuant to Section 9545(b)(1)(i), and that the claim, which could not have been raised earlier with the exercise of due diligence, was filed within 60 days of the date that it first could have been presented pursuant to Section 9545(b)(2).

Petitioner has proved that failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution.

Our Supreme Court mandates that [16] petitioner plead and prove that the failure to raise a claim previously was the result of interference by government officials. And

for that I cite Commonwealth v. Stokes, which was citing Commonwealth v. Hawkins.

By removing direct and indirect information which demonstrated that Amos Norwood had homosexual relationships with teenage boys from the statements that were turned over to the defense, the government interfered with the presentation of this claim.

In this case, the governmental interference is actually the Brady claim. They are one and the same.

The suppressed evidence establishes the fact that the government interfered.

The only way that petitioner could have demonstrated a Brady claim based upon the fact that there was information in the District Attorney's file and in the Philadelphia Police Department's file was to actually go into the files themselves.

Petitioner demonstrated that this [17] claim could not have been raised earlier by the exercise of due diligence, as is required by Commonwealth v. Yarris, Commonwealth v. Beasley, and Commonwealth v. Albrecht. And then petitioner brought this claim within 60 days from when the claim first could have been brought.

Petitioner established that the claim could not have been raised earlier with the exercise of due diligence through the affidavit and testimony of Marc Draper.

It is because of the statements in Mr. Draper's affidavit, in which he alleged that he made a statement about petitioner's motive for the crime, which was never disclosed to the defense, that this Court ordered the DA's and police boxes opened.

The information uncovered as a result of this Court's order could not have come to light if it weren't for Draper's original affidavit. Therefore, this Court analyzes whether this claim satisfies the due diligence requirement of Section 9545(b)(2) by determining whether petitioner exercised due diligence in learning of the information [18] contained in Mr. Draper's statement.

Mr. Draper stated in his affidavit and at the evidentiary hearing that he would not have spoken to Terry Williams' attorneys or anyone else about the events surrounding his life sentence for years.

In the late 1980s, Mr. Draper refused to speak with petitioner's counsel, and this is as per the Post-Sentence motion Notes of Testimony, he would not talk with Ed Chew when Nick Panarella sent him there.

At some point during his stay in Graterford, from 1996 to 2005, Mr. Draper again refused to talk with someone who came on petitioner's behalf.

Mr. Draper was credible when he said that his anger at Terry Williams, and at himself for having to serve a life sentence, prevented him from talking about the Norwood murder over the years.

The Court found that his explanation as to why he finally spoke up made sense.

Mr. Draper decided to break his silence on the subject because of the impact [19] of news of Terry Williams nearing execution in light of also having lost his appeals -- I'm sorry, in light of Williams having lost his appeals in March of 2011.

Terry Williams and Marc Draper were friends for a large portion of their youth.

The notion that Mr. Draper decided to put his own anger aside and speak up in order to spare the life of his childhood friend is not an incredible one, and the Court, in fact, credited it.

The Third Circuit denied Petitioner's habeas petition in March 2011.

Petitioner's counsel spoke with Mr. Draper nine months later in January of 2012.

Is a nine-month delay from the first moment when it could fairly be said that Terry Williams had lost his appeals until counsel's conversation with Mr. Draper not duly diligent? This Court finds that the nine-month delay is duly diligent within the meaning of Yarris.

Petitioner then filed his current [20] PCRA petition within 60 days of learning of the substance of Mr. Draper's January affidavit.

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Petitioner's claim is plainly not waived under Section 9544(b).

A claim of error is waived if the defendant or petitioner could have raised the issue at trial, on appeal, or in a prior post conviction proceeding but failed to do so.

Petitioner's claim of error in his PCRA was that the government suppressed evidence given by Marc Draper.

The PCRA court held an evidentiary hearing on that claim.

In the process of doing so, the District Attorney and Philadelphia Police trial boxes revealed the existence of suppressed evidence.

The Brady claim based on that evidence could not have been raised at any time prior to Marc Draper's statement that prior to the Norwood trial he told Ms. Foulkes and the police this case was really about a homosexual relationship, as it was only because of his statement that this Court [21] ordered that the trial boxes be opened.

Nor is Petitioner's claim previously litigated under Section 9544(a).

A claim of error is previously litigated when either the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue, or it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.

Appendix O

First, no court has ruled on the merits of Petitioner's current Brady claim.

Our Supreme Court addressed a claim of counsel's ineffectiveness for failing to investigate and present psychiatric mitigating evidence.

As part of that claim, petitioner elicited evidence from Donald Fisher that Mr. Norwood was very degrading and he liked to have sex with kids.

However, the current claim does not rest solely upon that evidence. In fact, it is based on evidence uncovered for the first time within the last two weeks.

The fact that the evidence inside [22] the DA and Police boxes corroborated evidence petitioner elicited at the 1998 PCRA hearing does not mean that his current claim has already been litigated.

The merits of the current issue revolve around whether or not the three prongs of Brady have been met, and that is Brady v. Maryland, whereas the merits of the previous issue was about ineffectiveness;

And, second, none of the claims raised by petitioner in the 1998 PCRA was based on the prosecution having suppressed Marc Draper's statement to the government or evidence of the victim's homosexual proclivities towards teenage boys. Not until Mr. Nolas amended his January 2012 PCRA petition in light of this Court's evidentiary hearing has petitioner raised the specific claim upon which relief is being granted.

Appendix O

To be entitled to a stay of execution under Section 9545(c), petitioner is required to prove a strong likelihood of success on the merits.

Petitioner exceeds that threshold, proving that there was impeachment [23] evidence, which was material to punishment, and if disclosed could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict as to the jury's sentence of death. And I cite to Cone v. Bell for that proposition, a United States Supreme Court case.

Petitioner demonstrated that the government sanitized the statements of two witnesses, Mamie Norwood and Reverend Charles Poindexter, removing information that either directly or indirectly demonstrated that the victim was a homosexual ephebophiliac.

For those who do not know, an ephebophile is an adult who has a sexual attraction to teens.

Additionally, Andrea Foulkes failed to disclose evidence in her possession that the victim had made sexual advances on a teenage member of his church, and that there were other possible instances of sexual impropriety.

Without this evidence, petitioner's counsel was given a skewed and incomplete picture of the victim, which [24] effectively tied his hands while the prosecution elicited testimony at trial about his kind and caring character.

Appendix O

If disclosed, the cumulative impact of this impeachment evidence would have enabled petitioner's counsel to challenge the government's sympathetic portrayal of the victim. Ultimately, the nondisclosure of that evidence undermines confidence in the jury's death sentence.

When undertaking the three-part Brady analysis, it is particularly instructive to compare the evidence in the government's possession against that which was given to petitioner's counsel in discovery.

A June 1984 police activity sheet revealed that the police learned during a June 22nd, 1984, interview -- Mr. Eisenberg and Ms. Godfrey, I will be happy to give you what I wrote, if you rather, so you don't have to be trying to get it down; I will be happy to share it -- that during a June 22nd, 1984, interview with Reverend Charles Poindexter that the victim may have been a homosexual, and that about five years prior to the [25] interview there had been a complaint from the mother of a 17-year old boy at church who said that the victim propositioned him for sex.

However, the version of the June 22, 1984, interview that the prosecution turned over to the defense omitted those portions of Reverend Poindexter's statement entirely.

The same June 1984 police activity sheet also revealed that the police learned that Mamie Norwood, the victim's widow, had told them about a time in which she awoke at 2 A.M. to find a young, slim male standing silently in the hallway of her home.

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Mrs. Norwood explained to police that her husband woke her to ask her for money. She then watched as her husband loaded some stereo equipment into his car, and then he got in and drove off with the young man.

Mrs. Norwood said that her husband returned home around 9 to 10:00 the next morning and told her a, quote, "rambling" story about being abducted, but how he was able to escape after using psychology on the captors until they fell asleep.

[26] Mrs. Norwood remembered that he pleaded with her not to get the police involved.

However, the version of Mrs. Norwood's statement turned over to the defense omitted this portion of her statement entirely.

A handwritten note by Assistant District Attorney Andrea Foulkes in the DA's office's file recounted a specific instance of Amos Norwood's homosexual ephebophilia.

She wrote the name of a young man, Ronald House, who had been "touched on privates" and that had heard from others about possible incidents. However, none of that information was turned over to the defense.

Without the evidence bearing an explicit or inferential connection to Amos Norwood's homosexual ephebophilia, the information that was actually provided to the defense created the false impression that references to Amos Norwood's homosexuality and alleged kidnapping were just red herrings.

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The government did disclose the statements of William Scott, Christopher [27] Wells, and Jesse Lofton, all of which included one question as to their knowledge of Amos Norwood's homosexuality. All three interviewees answered in the negative.

Additionally, Mr. Lofton mentioned the supposed kidnapping, but thought that it involved Mr. Norwood being held up at gunpoint at a red light, and was pretty sure it was reported to police.

The version of Reverend Poindexter's statement turned over to the defense mentioned the supposed kidnapping. He speculated that maybe it had something to do with drugs because Mr. Norwood worked as a chemist in New Jersey.

It is also worth noting that even though this non-disclosure was not about Amos Norwood, the police also failed to pass the search warrant of James Stallings' home, which revealed another middle-aged man with whom Terry Williams was very familiar had assorted nude photos of men laying around in his home, just as Herb Hamilton had.

Without the evidence above, the defense had one piece of information [28] suggesting that Mr. Norwood was a homosexual, Ronald Rucker's statement that "Terry said Amos was a homosexual and was the type to pay people." And the defense had one piece of information suggesting that Mr. Norwood was an ephebophile, Marc Draper's July 20th, 1984, statement in which he said that he asked

Mr. Norwood, "So you like boys?" To which Mr. Norwood had responded, "Yeah."

As I will discuss shortly regarding the materiality of all of this, the government's suppression not only deprived the defense of impeachment evidence with respect to Reverend Poindexter and Mamie Norwood, but it also resulted in painting an incomplete and misleading picture for defense counsel.

Evidence in the possession of the prosecution and the police are both subject to the Brady duty to disclose.

In order to comply with Brady, "The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." And that's from Strickler v. Greene, another United States [29] Supreme Court case.

Our Supreme Court endorsed that same principle in Commonwealth v. Burke saying that Brady extends to evidence in the files of police agencies of the same government bringing the prosecution.

The June 1984 activity sheet which detailed the complete versions of the Poindexter and Norwood interviews was found in the H-84-127 police box. The search warrant of James Stallings' home was also found therein. The evidence is properly considered within the scope of the prosecutor's control under Burke.

There are three essential components of the Brady claim.

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The first essential component of a Brady violation, according Strickler, requires that the evidence at issue be favorable to the accused because it is exculpatory or because it is impeaching. The information pulled out of the respective statements of Mamie Norwood and Reverend Charles Poindexter would have allowed a reasonable defense counsel to impeach them [30] after having testified to the following. And this is from Mamie Norwood and Andrea Foulkes asking her:

"You had indicated in response to questions by the defense attorney that your husband didn't pick up strangers.

Did your husband have occasion to take young people back and forth from time to time in his car?

"MRS. NORWOOD: The ones that he worked with, yes, that I knew.

"MS. FOULKES: How much of his time would you say, if you know; how often would he do that? Often? Rarely? Middle?

"MRS. NORWOOD: It would be every week at some point.

"MS. FOULKES: And then from time to time he would chauffeur young people from one point to another, would he not?

"MRS. NORWOOD: The ones that I know he works with, yes.

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"MS. FOULKES: When he would do that, would he take those young people home?

"MRS. NORWOOD: Yes."

A little further down Ms. Foulkes [31] says:

"From time to time, did you ever see evidence of that chauffeuring process by things left in your car?

"MRS. NORWOOD: Yes, sometimes."

And that was from the Notes of Testimony of January 14th, 1986, at Pages 157 to 158.

As to Reverend Charles Poindexter, the following was asked.

Question by Ms. Foulkes:

"Did Mr. Norwood have any special responsibility in the church regarding youth?

"REVEREND POINDEXTER: Yes, he did.

"MS. FOULKES: What were those responsibilities?

"REVEREND POINDEXTER: He was warden for many years of the acolytes or the service of the church, and he was in charge, he was the founder and in charge of what we called the Youth Theater Fellowship, which dealt with youth between the ages of seven and eighteen.

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"MS. FOULKES: Were there [32] occasions, Reverend, in connection with his duties, where Mr. Norwood would come to the church in the night hours to fulfill some of these duties?

"REVEREND POINDEXTER: Yes, there were.

"MS. FOULKES: Also, in your contact with Mr. Norwood, did you observe him from time to time transport young people from the church activities to their homes or other locations?

"REVEREND POINDEXTER: Frequently."

And that was from Notes of Testimony, January 14th, 1986, at 166 and 167.

On Redirect Ms. Foulkes asked: "Reverend, from time to time, do the church activities extend beyond the people who are parishioners and members of the church?

"REVEREND POINDEXTER: Yes, they do."

On Recross Examination

Mr. Panarella asked:

"Certainly, church activities or [33] functions are for church members; is that correct?

"REVEREND POINDEXTER: Well, the activities that Mr. Norwood participated in very often involve

young people outside of our parish congregation. In fact, many who are now active came in as a result that kind of inclusion.

"MR. PANARELLA: And that would occur at organized functions; is that correct?

"REVEREND POINDEXTER: Not necessarily. Sometimes they were simply trip services where they were invited to participate.

"MR. PANARELLA: There were no church services occurring late in the evening on June 11th, were there?

"REVEREND POINDEXTER: Oh, no, of course not.

"MR. PANARELLA: And there is nothing of any youth activities or anything of that nature that was going to take place at your church at that time; correct?

"REVEREND POINDEXTER: No.

"MR. PANARELLA: So when you make [34] reference to unusual or that it would not be unusual to have non-church members come to church functions, it would have been extremely unusual to have a non-parishioner at the church when no church functions were going on?

"REVEREND POINDEXTER: No, it would not have been."

Ms. Foulkes objected, the Court overruled it, and then Reverend Poindexter said:

"No, it would not have been."

"MR. PANARELLA: It would not have been unusual to have a non-church member at a non-church function late at night when the church wasn't open to the public?

"REVEREND POINDEXTER: No.

"MR. PANARELLA: That's correct?

"REVEREND POINDEXTER: Would you like me to explain?

"MR. PANARELLA: Yes.

"REVEREND POINDEXTER: Very often, Mr. Norwood had friends of some of the young people to help with the building of the sets for the plays and, quite often, I saw him with young people or the people who were working [35] with him, people that I never knew before.

"MR. PANARELLA: Again, you never knew Mr. Williams?

"REVEREND POINDEXTER: I never knew Mr. Williams.

"MR. PANARELLA: Or Mr. Draper?

"REVEREND POINDEXTER: No.

"MR. PANARELLA: Now, you were aware, were you not, that Mr. Norwood had some problem in the past?

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"REVEREND POINDEXTER: Some problem?

"MS. FOULKES: Objection, Your Honor.

"THE COURT: Just a moment, I am going to sustain it. I don't know quite what it is or how it is related to the circumstances here, so I will have to sustain the objection at this time."

And Mr. Panarella at that time then said:

"I have nothing further."

And that's from the Notes at Pages 172 to 174.

Had the evidence detailed above [36] been disclosed, it could have been used by a reasonable defense attorney to impeach the testimony of both Mamie Norwood and Reverend Charles Poindexter, in which they characterize Mr. Norwood as a kind church volunteer who wanted to help out the kids of the neighborhood.

Demonstrating that Mr. Norwood may have had ulterior motives, the homosexual ephebophilia, would have been favorable to the accused in this case.

The second essential component of a Brady violation according to Strickler requires that the evidence at issue be suppressed by the government, either willfully or inadvertently. The sanitization of the statements turned over to defense counsel, and the non-disclosure of the substance of Ms. Foulkes' handwritten notes

demonstrates that evidence has plainly been suppressed. And it isn't that she had to turn over her personal notes, but the information that she had gleaned, albeit that she wasn't turning over her notes.

Furthermore, the evidence borne [37] out over the course of the evidentiary hearing about former ADA Foulkes' sometimes playing a little fast and loose suggests that the scale -- which you will hear shortly also additional factors -- tip toward a finding that the suppression was closer to willful than to inadvertent.

Ms. Foulkes had just prosecuted Terrance Williams for the murder of Herbert Hamilton. In that case, she opened on the following information:

"However, Terrance Williams also had a secret life, and that secret life was his engagement in making money by hustling homosexuals for favors, for money, for clothing, for anything of value to him, and Herbert Hamilton was one of a number of people that Terrance Williams engaged in this.

Herb Hamilton was not the only individual with whom Terrance Williams engaged in this kind of enterprise.

You'll hear from Marc Draper that Terrance Williams had told him that he, on other occasions, sought to earn money, make money, what have you, by having homosexual [38] acts with various individuals."

During the trial of this case, Ms. Foulkes also questioned -- that's the Hamilton case -- Ms. Foulkes also questioned Marc Draper as follows:

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"Now, on other occasions that Terry discussed how he obtained money, had Terry indicated to you that with other individuals from whom he had obtained money or clothing, that he had, indeed, engaged in sexual relations?"

Answer from Draper:

"Yes."

Ms. Foulkes admitted at the September 20th, 2012, PCRA hearing before this Court, when speaking about petitioner and Mr. Norwood:

"Did I suspect that there was a sexual connection between them? Yes, I did."

And that's from the Notes of Testimony of that date at Pages 103 and 104.

Despite her sense as to the truth of the relationship in the Norwood case, Ms. Foulkes still made the following argument in closing at the penalty phase of the Norwood [39] case:

"Now, Ladies and Gentlemen, you know the horrible circumstances of the death of Amos Norwood. You know that the defendant, Terrance Williams, for no other reason but that a kind man offered him a ride home, that he and another man tied him up in the darkness of a cemetery and beat him to death, squashed him like a bug that you might be irritated with against a windshield, beat him with two blunt instruments."

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That was from the Notes of Testimony of February 3rd, 1986, at Page 1873.

Ms. Foulkes indicated or maintained to this Court that she did not care if she got less than First Degree Murder in the Hamilton case, and that she didn't care if she got death in the Norwood case.

This Court did not find this testimony to be credible. Instead, the Court is constrained to say that she did, at times, play games and took unfair measures to win.

And the following are some items that I will point to evidence of that.

In terms of how Ms. Foulkes had [40] handled the deal that had allegedly been struck with Draper and that was challenged, on February 20, 1985 at Page 375 in the Hamilton trial she said to Mr. Draper:

"You agreed to plead to murder, robbery and conspiracy. Second Degree Murder is a life sentence," and he answered: "Yes."

"You agreed to testify in this case and in the case for which you are charged; is that correct?

"ANSWER: Yes.

"Is that the full extent of any deals or agreements between yourself and the Commonwealth?"

"ANSWER: Yes."

Although this is a claim that should have been raised earlier, the Court views this as evidence of her wanting to win. Based on the Napue and Giglio cases, this is indisputably not the whole truth. She knew she was writing the letter for him, and the language of the letter that she personally wrote clearly indicates that there had been a separate agreement. At the hearing here before me she acknowledged that language.

[41] And then at the Norwood trial regarding that deal, on Cross of Draper by Panarella, Draper is asked:

"Was there anything more agreed upon between you, your attorney, your family and the police or the District Attorney's Office, other than what is embodied in this document," which at the trial was C-18, the agreement which Arnold Gordon signed, who was Chief of Homicide at that time.

And his answer was:

"No."

"Not nothing at all?

"No."

Ms. Foulkes had a duty to correct this because she knew she had agreed to something more, to write to the Parole Board, which she, in fact, did in 1988. This issue

is noted here to show that this was a course of conduct by Ms. Foulkes.

Again, regarding the desire to win first degree murder in the Hamilton case, February 20th, 1985, at Pages 436-437.

Mr. Williams' attorney, Steve Gallagher was going to call Gregory Lowe, also [42] known as Gregory Lee.

Judge Sabo asked:

"What would he be able to testify to?"

Mr. Gallagher said he would testify to a conversation with Marc Draper, that Marc Draper told him the facts of this killing and that he's the one that did the stabbing. Ms. Foulkes then had the detectives go and speak to the witness up in the cell room, which at that time was in City Hall, after which he decided not to testify for Williams.

Gregory Lowe did testify at the PCRA hearing in 1990, and testified that after a visit form Detective Cimino, he decided not to testify on defendant's behalf to that effect, as he was told it would affect any plea agreement that he was trying to work out with the Commonwealth, or that it could affect that plea agreement.

At that same PCRA hearing, Detective Cimino testified that Andrea Foulkes did come to them and said that the defense was going to call Lowe. And that's at – Gregory [43] Lowe testifying was September 10th, 1990, at Page 17, and Detective Cimino testifying is at Page 44.

He said he did go up to the cell room to see Mr. Lowe, claiming he merely wanted to see if this was the same person who had been their informant on a number of cases, and that he was concerned for Mr. Lowe's safety because they were responsible for him.

Ms. Foulkes testified before me that she did have the detective go up to talk to them and to see what this was about.

Regarding letters that the defendant wrote and gave to Marc Draper hoping he would testify in conformity therewith, which, again, showed certain conduct by Ms. Foulkes I submit the following:

Ms. Foulkes provided both letters to Attorney Gallagher in the Hamilton trial on February 21st, 1985, as she was calling Marc Draper to rebut Williams' testimony.

In responding to the attorney's complaint about having been deprived of these prior to trial, it appears that Ms. Foulkes was not candid with the Court. And this is at [44] Pages 639 to 642 or 643.

A review of the record reflects that she told the judge she had only gotten the letters that Monday, February 18th, 1985, and it is possible that the letters were mailed to George Draper, but she purposely waited to turn them over.

George Draper testified at Page 682 about receiving the letters from his son. She doesn't ask him when he got

them on direct; but on Cross Mr. Gallagher brings out that George Draper had gotten them on January 18th, 1985, more than a month earlier, and that he had turned them over to his attorney on January 19th, 1985.

But P-8, which was marked as an exhibit in this hearing, and that P-8 was dated December 20th, 1984, a Thursday, Ms. Foulkes' personal notes indicate that she knows about the letters and her notes indicate that she is going to have Marc Draper provide them to the detective next Friday, which would have been no later than December 28th, 1984. Even if it hadn't been the next day, December 21st, it certainly would have been by [45] December 28th, 1984.

Then she claimed to the court, to Judge Sabo, that she had to protect Marc Draper, but the fact is that she could have and should have, instead, sought a protective order from the judge to keep from having to disclose those to the defense. And this is presented here merely to show another example of gamesmanship by Ms. Foulkes as further evidence that she wanted to win and she had no problem disregarding her ethical obligations, because this move was in the face of case law to the contrary, and I will cite to the Supreme Court case of Commonwealth v. Rodgers, R-o-d-g-e-r-s, for that proposition, a 1983 case out of Philadelphia. And, Ms. Foulkes was clearly up on her case law, as evidenced by her citing to Commonwealth v. Beasley.

The third and final essential component of a Brady violation according to Strickler requires that prejudice ensue.

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Prejudice in this context is defined by the concept of materiality.

Evidence is material when, according to Cone v. Bell, there is a [46] reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different. In other words, when the evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

When undertaking the materiality analysis, the court in Kyles v. Whitley offered four aspects of materiality to help guide the determination.

The fourth aspect is particularly relevant to this case. Quote, "Materiality to is be judged by reference to the suppressed evidence considered collectively, not item-by-item, with the focus on the cumulative effect of suppression," closed quotes.

There is no better proof that prejudice ensued than Ms. Foulkes' own admission. As someone who had the privilege of viewing the suppressed evidence in the government's possession collectively, she said, as quoted above, "Did I suspect that there was a sexual connection between them? Yes, I did." And when the Court asked her, "So maybe he is doing Norwood and getting [47] money," she responded, "No, of course that occurred to me." And that was Notes of Testimony of September 20th, 2012, at Pages 102-103.

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Ms. Foulkes stated of course she felt like there was a homosexual relationship between petitioner and Norwood because she was able to connect all of the dots.

Had reasonable defense counsel been given all of the dots, that attorney, too, would have been able to connect them, and, at the very least, stand up in closing in response to Ms. Foulkes' penalty phase statement that there was no other reason and argue that there is enough evidence to suggest that Amos Norwood was a homosexual ephebophile who was taking advantage of petitioner.

The existence of an unsympathetic victim can be, in and of itself, sufficient to undermine one's confidence that the jury would have returned the same verdict of death.

For all of the reasons stated herein, petitioner has demonstrated that he is entitled to relief in the form of a new penalty phase.

[48] And I would note that the items that I have cited as to comments regarding homosexuality that were in Ms. Foulkes' notes and that were made exhibits during the course of the trial both by petitioner, as well as by the court exhibits, is not. So what I mentioned here is not exclusive. There are more; I just haven't spoken to every single item.

However, the Court finds that petitioner cannot meet the materiality standard with regard to the guilt phase.

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Had the suppressed evidence been disclosed and a complete picture presented to defense counsel, a reasonable attorney would have had the information needed to make a compelling argument as to mitigation. However, the suppressed evidence would not have put forth facts upon which a heat-of-passion defense could have being rooted.

Additionally, the overwhelming consciousness of guilt evidence would have outweighed any attempt to argue that petitioner committed this killing in the heat [49] of passion. Therefore, the suppressed evidence does not undermine confidence in the verdict of guilt.

And, accordingly, this Court is granting the stay of execution, and this Court is granting a new penalty phase.

Thank you.

MS. GODFREY: Your Honor, there are a few housekeeping items.

There is a few things, including Notes of Testimony and Your Honor's order regarding the order of no communication between the Commonwealth and the defense and any witnesses that may still be under seal. Can you unseal them so that we can have access?

THE COURT: And to whom are you referring?

MS. GODFREY: The Notes of Testimony. Anything that occurred on the record in the back.

THE COURT: Absolutely. Everything is unsealed. Yes, absolutely.

MS. GODFREY: And can we have our boxes back?

[50] THE COURT: Yes. I will get those to you probably very shortly.

Anything else?

MR. NOLAS: Not right now, Your Honor. Thank you very much.

COURT OFFICER: This Court will take a short recess.

COURT OFFICER: This court is back in session. Please cease all conversation and take your seats.

MS. GODFREY: Your Honor, is it possible to get a copy of --

THE COURT: Let me give you a copy.

Ms. Godfrey, you should not take this as this is my opinion.

MS. GODFREY: Okay.

THE COURT: It is what I read into the record as the basis for my ruling. As I said, I didn't want you try to write down every word that I was saying, and I want you all to understand that.

Does defense counsel want one as well, or not?

[51]MR. NOLAS: Sure.

THE COURT: I am not trying to suggest that you should want one or not.

MR. NOLAS: Your Honor, I was not taking notes, so, yes, it would be very helpful. Thank you.

Is Your Honor going to do a formal order, or --

THE COURT: I am sure the clerk will write up a formal order granting the stay of execution and granting a new penalty phase.

Is there anything else?

MR. NOLAS: No, Your Honor.

Thank you very much.

COURT OFFICER: This court is adjourned.

APPENDIX P — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED MARCH 9, 2011

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-9002

TERRANCE WILLIAMS,

Appellant,

v.

JEFFREY BEARD, Commissioner, Pennsylvania Department of Corrections; LOUIS B. FOLINO, Superintendent of the State Correctional Institution at Greene; FRANK TENNIS, Acting Superintendent of the State Correctional Institution at Rockview; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

December 7, 2010, Argued
March 9, 2011, Filed

Before: SMITH, CHAGARES, and ALDISERT, Circuit Judges.

OPINION

SMITH, *Circuit Judge.*

Appendix P

Twenty-five years ago, petitioner Terrance Williams was tried and convicted of first degree murder for the killing of Amos Norwood. A jury then returned a sentence of death. After two decades of appeals in the Pennsylvania state courts, Williams filed a petition for federal habeas review pursuant to 28 U.S.C. § 2254. The District Court denied the petition but certified two questions for our review, to wit: (1) whether trial counsel was constitutionally ineffective during the penalty phase of trial, and (2) whether the Commonwealth exercised its peremptory strikes in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). We permitted Williams to expand the certificate of appealability to include a question regarding the constitutional propriety of the trial court's accomplice liability instructions. We conclude that each issue is without merit and will affirm.

I

The story of Terrance Williams is reminiscent of Dr. Jekyll and Mr. Hyde. As Dr. Jekyll, Williams was a local football star, the quarterback of the Germantown High School team that won the Philadelphia Public League championship in 1982. He was presented with the sportsman of the year award by the Philadelphia Board of Sports Officials, and he was recruited by at least eight different collegiate institutions. Nearly all of Williams' coaches and teachers described him as mild-mannered, law-abiding, and honest. In 1983, Williams graduated from Germantown High and matriculated to Cheney State College in Philadelphia. In the estimation of one of his

instructors, Williams was "highly respected and admired by his teacher[s] and all of his classmates." He was "[n]ot only . . . the star of the school's football team, but [was] also . . . a classmate and student who showed respect for others and accepted his popularity with modesty."

But apparently Terrance Williams had a sinister side. In the dead of night on Christmas Eve in 1982, a sixteen-year-old Williams broke into the Philadelphia residence of Don and Hilda Dorfman, aged sixty-nine and sixty-four, respectively. He entered Mrs. Dorfman's bedroom, wakened her by pressing a .22 caliber Winchester rifle to her neck, and then pulled a bedsheet over her face. When Mrs. Dorfman attempted to remove the sheet, Williams ordered her to stop "or her fucking head would be blown off." Williams then fired the rifle three times into the wall to show the victims he was serious. Williams and an accomplice ransacked the home before making off with cash, jewelry, and the Dorfmans' automobile.

It was not long before Williams was apprehended and criminally charged for robbing and terrorizing the Dorfmans. Although his age placed him under the jurisdiction of the juvenile court, the Commonwealth moved to certify Williams as an adult. In an attempt to avoid certification, Williams produced no fewer than eight witnesses who attested to his stable home life, loving parents, and supportive extended family. Every character witness interviewed by the Commonwealth believed Williams to be innocent. Even his own attorney would testify years later, "I didn't feel in my own mind of mind[s] and heart of hearts that [Williams] was involved in the matter." Such was the nature of Williams' dual existence.

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In spite of the efforts to avoid it, Williams was certified to stand trial as an adult. He was released pending trial, however, and in January of 1984, he embarked in earnest on a crime spree that would continue for the better part of six months. Williams' next victim was a fifty-one-year-old man named Herbert Hamilton, an individual from whom Williams had been receiving money in exchange for sex. This relationship, like much else in Williams' life, was kept hidden from most who knew him. Hamilton apparently threatened to publicize the secret, so Williams took action.

On January 26, 1984, Williams called on Hamilton at his home. The two eventually retired to the bedroom and, as they proceeded toward the bed, Williams withdrew a concealed ten-inch butcher knife and attempted to stab Hamilton. Hamilton fought back, wrestled the knife from Williams, and stabbed Williams in the chest. Hamilton then dropped the knife and ran into the kitchen to telephone for assistance. Meanwhile, Williams retrieved a nearby baseball bat, chased after Hamilton, and beat him with the bat until Hamilton was bloody and severely wounded. Williams then recovered the butcher knife and stabbed Hamilton approximately twenty times--twice in the head, ten times in the back, once in the neck, four times in the chest, and once each in the abdomen, arm, and thumb. Finally, Williams drove the butcher knife through the back of Hamilton's neck until it protruded through the other side. He then doused Hamilton's body with kerosene and unsuccessfully attempted to set fire to it. When police officers later entered the apartment, they found Hamilton's kerosene-soaked body with the knife jammed through his neck; on the bathroom mirror, the

phrase "I loved you" was scrawled in toothpaste. Williams was then seventeen.

The Hamilton murder remained unsolved at the time that Williams went to trial for the Dorfman robbery in February of 1984. Williams maintained his innocence of the robbery throughout trial. He and his counsel mustered at least nine character witnesses who testified that Williams was a peaceful, law-abiding, and honest young man. The jury was not persuaded. They returned a conviction for two counts of robbery as felonies of the first degree, one count of burglary, one count of simple assault, one count of unauthorized use of an automobile, and one count of conspiracy. Williams was nevertheless released pending sentencing. Tragically, his crime spree continued.

On June 11, 1984, Williams and a friend, Marc Draper, were gambling with several others on a street corner in the West Mount Airy neighborhood of Philadelphia. It was not long before both young men lost all of their money. While brainstorming potential means by which to recoup their losses, Williams said that he knew a man who lived nearby from whom they could extort cash.[1] According

1. Approximately one month before this date, Williams and Draper were arrested for the armed robbery of fifty-three-year-old Robert Hill, an acquaintance of the late Herbert Hamilton. The Commonwealth discontinued the prosecution for this offense after Williams was sentenced to death for the Norwood killing. Evidence of the crime was not presented to the Norwood jury during the trial's penalty phase and was not offered by the Commonwealth during the PCRA proceeding. Given these circumstances, we have not considered the facts relating to this offense for purposes of our present inquiry.

to Williams, this individual--fifty-six-year-old Amos Norwood--was a closeted homosexual. With a plan that they would threaten to reveal Norwood's secret to his wife, Draper and Williams set off for Norwood's apartment.

When they arrived at Norwood's residence, Williams told Draper to wait outside. Williams emerged with $10 in cash approximately twenty minutes later. Williams and Draper were apparently satisfied with this amount because they returned to the street corner to resume gambling. A short time later, Norwood drove by the corner in his blue Chrysler LeBaron. When he spotted the vehicle, Williams said, "There goes my uncle," flagged down the car, and entered via the passenger side door. Norwood then drove away.

The blue LeBaron returned to the intersection several minutes later, whereupon Williams exited the vehicle, approached Draper, and said quietly, "Play it off like you going home, like you want a ride home, and we gonna take some money." Draper understood Williams to be proposing a robbery. The two then got inside Norwood's automobile and Draper began to provide false directions to his "home." In reality, Draper's directions led Norwood to a secluded area adjacent to the Ivy Hill Cemetery. Once there, Draper reached over the backseat, grabbed Norwood from behind and ordered him "to be quiet and get out of the car." Norwood stopped the vehicle and complied.

Williams and Draper then led Norwood into the cemetery and ordered him to lie facedown near a

tombstone. A quick search of Norwood's person revealed $20 hidden in his sock. At this point, Norwood began to plead for his life. The two assailants responded by removing Norwood's clothing and tying him up; Norwood's hands were bound behind his back with his shirt, his legs were bound together with his pants, and his socks were forcefully jammed into his mouth. Once Norwood was bound, Williams said to Draper, "Wait, I'm going to the car. We're getting ready to do something." And he walked off.

Williams returned with a tire iron and a socket wrench, the latter of which he gave to Draper. Draper, seemingly having second thoughts, urged Williams to leave. Williams replied, "I know what I'm doin, I know what I'm doin. Don't worry about it, I know what I'm doin." He then began battering Norwood's head with the tire iron. When he noticed that Draper was frozen in place, Williams said, "Man, you with me[?] We got to do this together." Draper then sprung into action himself, striking Norwood repeatedly with the socket wrench. This violent scene continued until Norwood lay motionless and dead. Draper later recalled that there was blood everywhere. On the day of his second murder, Williams was four months past his eighteenth birthday.

Williams and Draper soon parted ways. Draper reported to work, while Williams took Norwood's automobile downtown to meet a friend, Ronald Rucker. Rucker noticed that Williams was "hyper" and asked him if everything was okay. Williams then disclosed that he had just "offed a guy" named Amos. Although Rucker

initially did not believe his friend, he began to reconsider after observing blood stains on Williams' shoes. Later that night, Williams told Rucker he was "going to get some gas from a gas station to go back to the scene of the crime." Rucker surmised that Williams intended to burn Norwood's body. That is precisely what Williams did.

Williams and Draper were eventually undone by their use of a credit card and telephone calling card--both in Norwood's name--that they had taken from Norwood's automobile. Philadelphia police traced use of the calling card back to Rucker; upon questioning, he implicated Williams and Draper. When his interview with law enforcement concluded, Rucker informed Williams that he had provided police with Williams' last name. Panicked, Williams boarded a bus bound for San Francisco. In the meantime, Draper was arrested and promptly confessed. He also told police about the Herbert Hamilton killing. With this information, officers proceeded to obtain a warrant for Williams' arrest.

Approximately halfway through his cross-country bus ride, Williams telephoned his girlfriend, Marlene Rogers. Rogers informed him about the outstanding arrest warrant, and urged her boyfriend to return to Philadelphia so that he could defend the charges against him. Her entreaty was apparently convincing, for Williams promptly boarded an airplane and returned east. On July 23, 1984, he arranged to be arrested in the Philadelphia office of his attorney, Ronald White. Williams' mother notified a reporter from the *Daily News* that her son would surrender to authorities in White's office. Before

his arrest, Williams told the newspaper, "I wanted to come back and clear my name." The reporter snapped photographs as Williams was led out of White's office in handcuffs.

Two days later, Williams was sentenced to twelve-and-a-half to twenty years' imprisonment for his participation in the Dorfman robbery. In February 1985, he was tried and convicted of third degree murder for the Hamilton killing. Finally, a jury trial for the Norwood murder commenced in January of 1986 in the Philadelphia Court of Common Pleas. Draper testified for the Commonwealth and detailed the manner in which he and Williams guided Norwood to the Ivy Hill Cemetery, robbed and bound him, and then beat him to death. Williams later took the stand in his own defense and pinned the murder on Draper and another individual, Michael Hopkins. The jury rejected Williams' testimony and returned a conviction for first degree murder, robbery, and conspiracy.

The trial's penalty phase began immediately after the jury announced its verdict.[2] The Commonwealth introduced evidence that Williams was recently convicted of armed robbery and third degree murder. Williams, in turn, presented three witnesses in mitigation. His mother, Patricia Kemp, described her son's athletic success and

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2. At the time of Williams' trial and conviction, Pennsylvania law required that "[a]fter a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment." 42 Pa. Cons. Stat. § 9711(a)(1).

testified that he was well-liked and respected by those who knew him. She also characterized Williams' stepfather as a verbally abusive alcoholic who routinely berated her son and once pushed him down a flight of stairs. Ms. Kemp denied participating in any abuse herself. Marlene Rogers, Williams' girlfriend and the mother of his thirteen-month-old child, said that Williams was a "very supportive father" and had never been violent towards her or anyone she knew. The defendant's last mitigation witness added little, rambling that "we all have sinned and come short of the glory of God . . . . We all have committed murder. We all have stolen some things that we should not have done. We all have committed adultery. I don't believe you should kill another person. Blood will be on your hands."

After witness testimony was complete, Williams' trial counsel, Nicholas Panarella, closed by emphasizing the defendant's youth at the time of the murder and by urging the jury to find that age was a mitigating factor in the offense. He then asked that they consider any residual doubt remaining from the guilt phase and argued that a sentence of life imprisonment was sufficiently severe, for it would subject Williams to "all of the brutalities that are associated with prison life." Panarella concluded by pleading for mercy. His plea was rejected. The jury found two aggravating circumstances, namely (1) that the murder occurred during commission of a felony (robbery), 42 Pa. Cons. Stat. § 9711(d)(6), and (2) that Williams had a significant history of felony convictions involving the use or threat of violence, 42 Pa. Cons. Stat. § 9711(d)(9). The jury found that there were no mitigating circumstances present in the case. They returned a sentence of death.

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II

Williams has been contesting the jury's death sentence almost from the moment it was announced on February 4, 1986. Shortly after trial, he dismissed Panarella and obtained new counsel, Norris Gelman. Gelman promptly filed a motion for a new trial on ineffective assistance of counsel grounds. On April 24 and July 1, 1987, the trial court held hearings on the motion during which Panarella was called to the stand to provide testimony on his mitigation strategy. He indicated that his central focus was Williams' youth, which he believed to be the mitigating factor most applicable under § 9711 of the Pennsylvania Consolidated Statutes. Panarella also explained that Williams provided him little, if any, assistance, which frustrated efforts to present a strong cadre of character witnesses on the defendant's behalf. Finally, when asked why he did not proffer evidence that Williams was psychologically damaged, Panarella was frank:

My own personal observations of Mr. Williams were and are that he is a very cold, calculating person. I did not discern any area where there was any doubt in my mind or that would have caused me to consider the fact that he was either not qualified or incapable of standing trial or facing punishment.

At the conclusion of the hearing on July 1, 1987, Williams' motion for a new trial was denied. The trial court thereafter sentenced him to death on the first degree murder conviction.

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On February 8, 1990, the Pennsylvania Supreme Court affirmed the trial court's judgment and conviction. *See Commonwealth v. Williams (Williams I)*, 524 Pa. 218, 570 A.2d 75 (Pa. 1990). Williams did not petition for *certiorari* in the United States Supreme Court. He did, however, timely file a pro se petition for relief under Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. § 9541 *et seq.*[3] New counsel was appointed and filed an amended petition raising twenty-three separate claims for relief.[4] Among them, Williams argued that the Commonwealth exercised its peremptory strikes in a racially discriminatory manner, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and that Panarella provided constitutionally ineffective assistance during the trial's penalty phase. The Court of Common Pleas denied relief on October 20, 1998, and on December 22, 2004, the Pennsylvania Supreme Court affirmed over the dissent of two justices.[5] *See Commonwealth v. Williams (Williams II)*, 581 Pa. 57, 863 A.2d 505 (Pa. 2004).

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3. Williams' PCRA petition was timely because he filed it before the post-conviction statute was amended to require petitioners to seek collateral relief within one year of the date that judgment becomes final. *See* 42 Pa. Cons. Stat. § 9545(b); *see also Lewis v. Horn*, 581 F.3d 92, 97 n.2 (3d Cir. 2009).

4. For a comprehensive compilation, see the May 8, 2007 order filed by the District Court. *Williams v. Beard*, 2007 U.S. Dist. LEXIS 41310, at *7-10 (E.D. Pa. May 8, 2007).

5. Williams filed a second PCRA petition on February 18, 2005. The Common Pleas Court dismissed the petition as untimely under 42 Pa. Cons. Stat. § 9545, and the Pennsylvania Supreme Court affirmed on September 27, 2006.

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In July of 2005, Williams filed a timely petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. He therein raised a total of twenty-one claims, most of them not pertinent to the instant appeal. The District Court denied the petition in a thorough memorandum dated May 8, 2007, but granted Williams a certificate of appealability on two issues: (1) whether the Commonwealth exercised its peremptory strikes in a racially discriminatory manner, and (2) whether trial counsel was constitutionally ineffective during the penalty phase. We later granted Williams' motion to expand the certificate of appealability, permitting him to contest the constitutionality of the trial court's jury instructions on accomplice liability.[6] We address each of these issues in turn.

III

The District Court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. The District Court did not conduct an evidentiary hearing in this case, instead limiting itself to the evidence contained in the state court record. Our

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6. We also granted Williams' motion to certify a fourth issue for review, namely: whether the aggravating circumstance set forth at 42 Pa. Cons. Stat. § 9711(d)(6) was improperly applied by the jury in violation of due process and the Eighth Amendment. Williams later abandoned this issue, stating, "Since the jury found another valid aggravating circumstance and no mitigating factors, Petitioner does not believe he can show prejudice resulting from this error and will not pursue this claim." Appellant Br. at 1 n.1. Accordingly, we do not address this contention.

review of the District Court's legal conclusions is therefore plenary, and we evaluate "'the state courts' determinations under the same standard that the District Court was required to apply.'" *Lewis v. Horn*, 581 F.3d 92, 100 (3d Cir. 2009) (quoting *Thomas v. Horn*, 570 F.3d 105, 113 (3d Cir. 2009)).

Review of the instant petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2241 *et seq. Hardcastle v. Horn*, 368 F.3d 246, 254 (3d Cir. 2004) (petitions filed after April 1996 subject to AEDPA standards). For inmates such as Williams, who are incarcerated by the state, AEDPA prohibits federal court relief on claims which have not been presented to the state's tribunals. *See* 28 U.S.C. § 2254(b). If a petitioner's claim has been adjudicated on the merits in state court, habeas relief is precluded unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d). Thus, AEDPA erects "'a substantially higher threshold' for obtaining relief than de novo review." *Renico v. Lett*, U.S. , 130 S. Ct. 1855, 1862, 176 L. Ed. 2d 678 (2010) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007)). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state- court decision applied clearly established federal law erroneously or incorrectly," *Williams v. Taylor*, 529

U.S. 362, 411, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); relief instead requires a determination that the state court's application was unreasonable, *Renico*, U.S. , 130 S. Ct. at 1862.

In addition, AEDPA endows a state tribunal's findings of fact with a "presumption of correctness," and this presumption extends "to the factual determinations of state trial and appellate courts." *Duncan v. Morton*, 256 F.3d 189, 196 (3d Cir. 2001) (citing 28 U.S.C. § 2254(e)(1) and *Dickerson v. Vaughn*, 90 F.3d 87, 90 (3d Cir. 1996)). To overcome the presumption, a habeas petitioner must proffer clear and convincing evidence to show that a factual determination is "objectively unreasonable in light of the evidence presented in the state-court proceeding."[7]

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7. Section 2254(e)(1) refers to a state court's specific factual determinations--in other words, the discrete findings that "are subsidiary to the ultimate decision." *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004). These findings may be set aside only upon a showing that there is clear and convincing evidence to the contrary. A challenge to the state courts' ultimate factual determination proceeds under § 2254(d)(2). That section, which refers to "an unreasonable determination of facts in light of the evidence presented in the State Court proceeding," requires a federal habeas court to "assess whether the state court's determination was reasonable or unreasonable" given the totality of the evidence adduced in the state tribunal. *Lambert*, 387 F.3d at 235. A challenge to the state court's individual findings of fact under § 2254(e)(1) may be based "wholly or in part on evidence outside the state trial record." *Id.* However, "even if a state court's individual factual determinations are overturned, what factual findings remain to support the state court decision must still be weighed under the overarching standard of section 2254(d)(2)." *Id.* at 235-36.

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Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). Our review proceeds under this AEDPA rubric.

A *Batson* Claim

Williams, who is an African American male, argues that the Commonwealth's use of peremptory challenges during jury selection violated *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In *Batson*, the Supreme Court held that deliberate or purposeful exclusion of African Americans from jury service violates the Equal Protection Clause. *Batson*, 476 U.S. at 84. The decision set forth a three-step procedure for evaluating claims of discrimination in the jury selection process:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El, 537 U.S. at 328-29 (discussing three-step inquiry and citing *Batson*, 476 U.S. at 96-98). *Batson* was handed down in April 1986--four months after the jury was empaneled to hear the Norwood murder trial. However, because Williams' conviction was pending on direct review at the time Batson was decided, its holding

applies retroactively to jury selection in the Norwood case. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). We thus begin our review of Williams' *Batson* claim by reconstructing the voir dire, which commenced on January 6, 1986.

Each party was afforded a total of twenty peremptory challenges. The Commonwealth exercised its first two strikes on African American venirepersons; this prompted Panarella to object and led to the following exchange:

> MR. PANARELLA: Your Honor, I'm not sure of the case but there was a recent case which dealt with an attempt by the State or the Commonwealth to systematically exclude blacks from the jury. I think it would be appropriate if we were to ask the Commonwealth on what basis they exercised the peremptory challenge.
>
> THE COURT: Anything you want to say? [PROSECUTOR]: No, your Honor, and I might point out that the defense has exercised its peremptory challenges. I believe that this may be only the first challenge that I have exercised at all.
>
> THE COURT: So far, the defense has challenged peremptorily two persons who, incidentally, both of whom were white. The Commonwealth has peremptorily challenged two persons who, incidentally, both of whom are black. The Court is very cognizant of the law in that

> area; however, at this point, I can see nothing that suggests that the peremptory challenges are being based on race alone. I'm not going to ask the Commonwealth to set forth the reason; however, I will ask Miss Foulkes if the peremptory challenges are being based on race alone?
>
> [PROSECUTOR]: Absolutely not, your Honor. I might suggest they are not being based on race at all.
>
> THE COURT: Thank you very much. The record will reflect your objection.

The Commonwealth then used its next two peremptory challenges to strike two more African American members of the venire. Panarella objected a second time, stating, "I have raised an objection with respect to how she has raised her peremptory challenges."[8] The trial judge then stated,

> With respect to your objection concerning the use of peremptory challenges, that is your right and if there's anything you want to say further regarding that, you are free to say it. . . . You made your position plain the last time, Miss Foulkes, and I continue to accept that you are

8. The Commonwealth argues that Panarella's statement does not constitute an objection. This assertion is belied by the record. The trial judge himself characterized the statement as an "objection," and certainly responded in a manner indicating that he was ruling on a formal objection.

> challenging people without respect to race but with respect to what other determinations you choose to make which you believe to be right under the law.

In response, the prosecutor, Andrea Foulkes, simply noted that "the record will speak for itself."

The Commonwealth thereafter struck ten additional African American venirepersons. Panarella did not object to the exercise of any of these strikes. In sum, fourteen of the sixteen peremptory challenges exercised by the prosecutor were utilized to dismiss African Americans. She struck fourteen of the nineteen African American venire members that she had the opportunity to peremptorily dismiss. In contrast, Foulkes struck only two of the twenty-one white individuals she had the opportunity to peremptorily excuse. At the conclusion of voir dire, the trial court empaneled a jury composed of five black jurors and seven white jurors.

Williams did not advance a *Batson* challenge on direct appeal. He did, however, raise the issue in his PCRA petition. Williams' petition also asserted that his trial counsel was ineffective "for failing to insist that [the prosecutor] provide race neutral reasons for her challenges," and that appellate counsel was ineffective for neglecting to raise a *Batson* claim on direct appeal. In April 1998, twelve years after jury selection in the Norwood murder trial, the PCRA court held an evidentiary hearing on the issue.

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At the outset of the hearing, the PCRA court provided Williams with several pages of notes that the judge had taken during voir dire.[9] The court summarized its notes for the record:

> There were 111 prospective jurors called. That's [the] total composition of the jury panel from which the jury was selected. Of those 111, 68 were white and 43 were black. The composition of the jury, the 12 principal jurors, was 7 white and 5 black. Total perempts-- neither side used the full quota of 20 perempts. The total perempts were 35, 18 of which were applied to white prospective jurors, 17 to black prospective jurors.
>
> The Commonwealth utilized 16 peremptory challenges, 2 of white jurors, 14 of black jurors. The defense used 19 peremptory challenges, 16 of white jurors, 3 of black jurors.

Williams then called Foulkes to the stand. She provided an explanation for each of her peremptory challenges and stated that she "categorically did not" strike any venireperson on the basis of race. Foulkes also testified that in order to prepare for the PCRA hearing, she reviewed a transcript of voir dire as well as the handwritten notes

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9. Williams was tried in the Philadelphia Court of Common Pleas before the Honorable David N. Savitt, Jr. Pursuant to 42 Pa. Cons. Stat. § 9545, jurisdiction over a PCRA proceeding lies in the Common Pleas court. Accordingly, Judge Savitt also presided over Williams' petition for collateral relief.

that she took during jury selection. After reviewing both the transcript and the notes, Foulkes created a one-page document that summarized, to the best of her recollection, the rationale behind each peremptory challenge. She used this summary to aid her PCRA testimony, though she acknowledged that she was unable to remember each of her reasons for exercising a strike. Williams' counsel was provided a copy of the one-page summary and used it to question Foulkes during the hearing.

In addition, Williams moved for production of the handwritten notes that Foulkes took contemporaneous with voir dire. He argued that production of the notes was necessary so that he could discover whether Foulkes recorded the race of each potential juror, and to check the veracity of her testimony. The PCRA court reviewed the contemporaneous notes *in camera* and thereafter denied Williams' request. According to the court, the notes contained

> nothing [] that needs to be supplied to defense counsel or to be made part of the record. Miss Foulkes was called by the defense and testified fully and completely using, in a very limited way, the notes that are the subject of this inquiry to refresh her recollection. Under the circumstances, . . . no further discovery is warranted.

In a written order dated January 13, 1999, the PCRA court denied Williams' *Batson* challenge, concluding that he had failed to make out a prima facie case at step one

of *Batson*'s three-step analytical framework.[10] Williams appealed, and the Pennsylvania Supreme Court ruled that the Batson claim was waived because it was not presented on direct appeal. It then turned to the derivative ineffective assistance of counsel claims. To assess these claims, the court looked to the underlying *Batson* challenge. Under Pennsylvania law, as set forth in *Commonwealth v. Uderra*, 580 Pa. 492, 862 A.2d 74 (Pa. 2004), the failure to raise a Batson objection during voir dire deprives a petitioner of *Batson*'s three-step burden-shifting procedure. A petitioner so deprived must instead shoulder the burden to prove actual, purposeful discrimination by a preponderance of the evidence. The Pennsylvania Supreme Court found that Williams' "trial counsel did not raise a *Batson* objection during *voir dire*," and thus the Uderra rule applied. *Williams II*, 863 A.2d at 514. It then determined that Williams had not marshaled evidence sufficient to prove actual, purposeful discrimination. *Id.* at 515. In other words, the Pennsylvania Supreme Court held that the underlying *Batson* claim was without merit. Because the *Batson* claim was meritless, Williams' trial and appellate counsel could not have been ineffective for failing to raise it. Finally, the court rejected Williams' contention that he was entitled to production of Foulkes' contemporaneous handwritten notes, concluding that he had "fail[ed] to demonstrate exceptional circumstances existed which required production of the actual notes." *Id.* at 515 n.10 (citing 42 Pa. Cons. Stat. § 9545(d)(2) ("No discovery, at any stage of proceedings under this

10. The PCRA court did not address Williams' derivative claims of trial and appellate counsel's ineffectiveness.

subchapter, shall be permitted except upon leave of court with a showing of exceptional circumstances.")).

Williams' federal habeas petition presented both his *Batson* claim and the derivative claims of ineffective assistance of counsel. He also requested an evidentiary hearing and an opportunity to discover Foulkes' handwritten notes. The District Court denied Williams' request for discovery, addressed the *Batson* claim on its merits,[11] and held that the PCRA court unreasonably applied clearly established federal law when it concluded that Williams had not made a prima facie showing of racial discrimination at step one of the *Batson* analysis. Even so, the District Court found that the Commonwealth proffered clear and reasonably specific race-neutral reasons for its peremptory strikes and that, in the face of such a proffer, Williams was unable to show purposeful discrimination in the Commonwealth's selection of jurors. Therefore, the Court held that Williams' *Batson* challenge was without merit.

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11. The District Court correctly held that Williams did not procedurally default his *Batson* claim by failing to raise it on direct appeal. *See Wilson v. Beard*, 589 F.3d 651, 658 (3d Cir. 2009) ("As we have held on numerous occasions, in capital cases where the waiver occurred before the Pennsylvania Supreme Court made it clear that it would no longer apply the relaxed waiver rule, the waiver rule was not 'firmly established and regularly followed' and, therefore, the waiver is not an adequate basis for a finding of procedural default."). The Commonwealth does not contest this aspect of the District Court's opinion.

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Williams contends that the District Court erred in three respects: first, it should have compelled production of the handwritten notes; second, it should have conducted an evidentiary hearing to allow Williams to question Foulkes regarding the content of the notes; and third, it should have concluded that the Commonwealth's use of peremptory challenges contravened *Batson*. The Commonwealth offers rejoinders to each of these arguments and identifies two alleged errors of its own. Specifically, the Commonwealth claims that (1) the Pennsylvania Supreme Court's application of the rule announced in *Commonwealth v. Uderra*, 580 Pa. 492, 862 A.2d 74 (Pa. 2004), is reasonable and governs the analysis of Williams' *Batson* challenge; and (2) even if the *Uderra* rule does not apply, the PCRA court reasonably concluded that Williams failed to make a prima facie showing of purposeful discrimination.[12] We address each of these competing claims below.

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12. The Commonwealth also claims that under our recent decision in *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008), Williams may only challenge the prosecutor's second peremptory strike, for this is the only strike to which he contemporaneously objected. In *Abu-Jamal*, we held that a timely, contemporaneous objection is required in order to preserve a *Batson* issue for appeal. 520 F.3d at 284. We explained that the failure to object during voir dire prevents the trial court from fulfilling responsibilities that are critical to the *Batson* framework, namely: evaluating the prosecutor's credibility and demeanor and, if necessary, promptly remedying defects in the selection process. *See id.* at 281-82. In this case, there is no question that Williams raised an objection after the Commonwealth exercised its second peremptory strike. Williams then objected again following the prosecutor's fourth peremptory challenge. By raising two objections during jury

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1 Production of Prosecutor's Notes & Evidentiary Hearing

Williams argues that the PCRA court denied him a full and fair opportunity to litigate his *Batson* claim when it rejected his request to produce Foulkes' contemporaneous voir dire notes. He does not ask us to review the state court's evidentiary decision, but instead argues that under federal law, he is entitled to production of the notes so that he may pursue his § 2254 claims in federal court. Williams petitioned the District Court for production of the notes and for an evidentiary hearing in which to probe the rationale underlying the Commonwealth's exercise of peremptory challenges. The District Court denied both requests. Williams claims that this ruling was in error.

Discovery in § 2254 litigation proceeds according to Rule 6 of the Rules Governing § 2254 Cases. That provision states, "A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." Accordingly, habeas petitioners are entitled to discovery only upon a showing of "good cause," and even then, the

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selection, Williams satisfied the contemporaneous objection requirement. See Lewis, 581 F.3d at 102 (requiring "a timely objection" to preserve a Batson claim under *Abu-Jamal* (emphasis added)). He unequivocally put the trial court on notice of his equal protection challenge and he allowed the court to inquire as necessary. The court had an opportunity to evaluate the prosecutor and, if it deemed appropriate, to investigate the reasons underlying the strikes. This is all that *Abu-Jamal* requires. The Commonwealth's arguments to the contrary are without merit.

scope of discovery is subject to a district court's sound discretion. *See Harris v. Nelson*, 394 U.S. 286, 299-300, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969) (discussing pre-Rule 6 discovery standard); *Bracy v. Gramley*, 520 U.S. 899, 909, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997) (explaining that Rule 6 was meant to be consistent with Harris); *see also Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir. 1994) ("A district court sitting in a habeas case retains the discretion to permit additional discovery if the petitioner presents 'good cause' to do so."). A habeas petitioner may satisfy the "good cause" standard by setting forth specific factual allegations which, if fully developed, would entitle him or her to the writ. *See Harris*, 394 U.S. at 300; *see also Lave v. Dretke*, 416 F.3d 372, 380 (5th Cir. 2005). The burden rests upon the petitioner to demonstrate that the sought-after information is pertinent and that there is good cause for its production. R. 6(b) R. Gov. § 2254 Cases; *Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004); *Murphy v. Johnson*, 205 F.3d 809, 814-15 (5th Cir. 2000).

We review the District Court's denial of a discovery request for abuse of discretion. *Smith v. Mahoney*, 611 F.3d 978, 997 (9th Cir. 2010); *Teti v. Bender*, 507 F.3d 50, 60 (1st Cir. 2007); *Williams*, 380 F.3d at 974; *United States v. Roane*, 378 F.3d 382, 403 (4th Cir. 2004); *Newton v. Kemna*, 354 F.3d 776, 783 (8th Cir. 2004); *see also Bracy*, 520 U.S. at 909. A district court abuses its discretion when discovery is "'essential for the habeas petitioner to develop fully his underlying claim.'" *Mahoney*, 611 F.3d at 997 (quoting *Dung The Pham v. Terhune*, 400 F.3d 740, 743 (9th Cir. 2005)).

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The PCRA court afforded Williams considerable latitude to develop the facts underlying his *Batson* challenge during collateral proceedings. Williams was granted a six-day evidentiary hearing; he called Foulkes to the stand and conducted an extensive examination; he was provided with a one-page document, created by Foulkes, summarizing her concerns with each of the venire members that she struck; and he was given several pages of the trial court's voir dire-related notes. What is more, although Williams was not supplied with Foulkes' handwritten voir dire notes, he was expressly permitted to question the prosecutor regarding that which she recorded in those notes.

On direct examination, Foulkes described the content of her handwritten notes as follows:

> I took notes with respect to each individual prospective venire person as they came up and as they spoke. My process of thinking requires contemporaneously writing. It's just something that I do. And what I wrote down were principally what it was that they said. It's that simple. If there was something overtly extraordinary about the witness that I observed, I would also write that down, but not always, and that was not always necessary, and whatever I didn't write down would also be reflected on the record.

Foulkes later explained that she "mostly wrote down things like location, age, whether they had children, where

they worked, the things that we ask in voir dire routinely." Thus, according to Foulkes, much of what she recorded in her notes was also reflected in the record; in other words, the information was readily available for Williams to use as he mounted his collateral attack.

When Williams queried whether Foulkes recorded each prospective juror's race, the prosecutor replied that she generally did not, stating

> No, I don't believe I did. I would record both black and white jurors in the couple of occasions that I recorded race at all. I recorded them more or less equally for black and white jurors, and I don't think I did it beyond the first few prospective jurors, and then I just stopped doing it. It wasn't necessary, certainly, to do it.

Of course, the PCRA judge heard Foulkes' testimony and her description of the notes' contents. When he later examined the notes *in camera*, he was aware of the prosecutor's representations, as well as Williams' specific concerns regarding the veracity of those representations. Yet, the court stated on the record that it found "nothing [in the notes] that needs to be supplied to defense counsel or to be made part of the record." Furthermore, the court characterized Foulkes' testimony regarding her notes as "full" and "complete," and ruled that "no further discovery is warranted."[13]

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13. Prior to the PCRA court's *in camera* review, Williams' counsel made several oral requests for production of the notes.

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Williams now essentially asks that we disbelieve the PCRA court, yet he presents us with no fact-based reason to do so. Instead, he argues that the notes are imperative so that he may inquire into the prosecutor's state of mind. His argument proceeds as if he has never had such an opportunity. But Williams has subjected Foulkes to cross examination on precisely this point. He has also discovered a summary compilation of the motives underlying her strikes. The PCRA judge compared this summary, *in camera*, to Foulkes' raw notes, and pronounced it a "full" and "complete" disclosure. Thus, Williams has already been afforded significant opportunity to discover the prosecutor's state of mind; he fails to set forth, in a colorable manner, exactly what he lacks.

His arguments in favor of production were clear and well stated. Foremost, he was concerned that Foulkes was not disclosing the complete contents of the notes. Thus, counsel argued, "I should not be in a position, with all due respect to the witness and her high office, of taking her word for it. She's got notes; I should be allowed to look at her notes. She's just like any other witness. And I can't--as my client's attorney, I'm charged with a responsibility to not take her word for it. My job is to get the notes so I can check the veracity of her answers, and that's why I've sought the notes." Counsel was also interested in evidence of Foulkes' thought process. He argued, "She may have a pattern of what she recorded that could reflect what she thought at the time she exercised her strikes." Both of these contentions were proffered directly prior to the PCRA court's *in camera* review. When the PCRA court subsequently described the testimony as "full" and "complete," it was implicitly indicating that Foulkes testified truthfully about the notes' contents and that they contained no relevant, undisclosed indicator of her subjective motivation.

Ultimately, Williams' request amounts to an entreaty to engage in a fishing expedition. The law is clear, however, that such speculative discovery requests should be rejected. *See Murphy*, 205 F.3d at 814 ("Simply put, Rule 6 does not authorize fishing expeditions."); *see also Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir. 1987). The District Court reviewed the record of collateral proceedings, remarked upon the significance of both the PCRA court's *in camera* review and subsequent characterization of the notes, and ruled that Williams "received all the information he is constitutionally entitled to in order to proceed with his *Batson* claim." The District Court did not abuse its discretion in reaching this conclusion.[14] *See Mahoney*, 611 F.3d at 997 (stating that a district court abuses its discretion when it denies discovery that is essential to development of the petitioner's claim).

In addition, the District Court did not abuse its discretion by denying Williams' motion for an evidentiary

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14. The District Court incorrectly applied 28 U.S.C. § 2254(d) to Williams' request for production, holding that the PCRA court's "refusal to turn over the notes was not contrary to or an unreasonable application of clearly established federal law," and that the decision was "not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." Section 2254(d) applies only to a "substantive request for habeas relief" and not a discovery request. *Fahy v. Horn*, 516 F.3d 169, 180 (3d Cir. 2008). Application of § 2254(d) to a habeas discovery request surely imposes an overly stringent burden, one that a petitioner is unlikely to meet. The District Court's error is not fatal, however, for we exercise plenary review over the Court's legal conclusions, see *Lewis*, 581 F.3d at 100, and ultimately reach the same result under Rule 6.

hearing. District courts have discretion to grant such hearings under § 2254(e)(2). *Palmer v. Hendricks*, 592 F.3d 386, 393 (3d Cir. 2010); *Campbell v. Vaughn*, 209 F.3d 280, 287 (3d Cir. 2000). We have set forth two considerations to guide a district court when confronted with such requests: first, it "should determine whether the petition presents a prima facie showing which, if proven, would enable the petitioner to prevail on the merits of the asserted claim," and second, even if the petitioner satisfies this first criterion, the court "may decline to convene an evidentiary hearing if the factual allegations are 'contravened by the existing record.'"[15] *Palmer*, 592 F.3d at 393 (quoting *Schriro*, 550 U.S. at 474); *see also Morris v. Beard*, 633 F.3d 185, 2011 U.S. App. LEXIS 1551, at *28 (3d Cir. Jan. 26, 2011) ("'[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief,' no evidentiary hearing is required." (quoting *Schriro*, 550 U.S. at 474)). Moreover, we have stressed that "courts [should] focus on whether a new evidentiary hearing would be meaningful, in that a new hearing would have the potential to advance the petitioner's claim." *Campbell*, 209 F.3d at 287.

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15. "Under § 2254(e)(2), 'a habeas court is barred from holding an evidentiary hearing unless the petitioner was diligent in his attempt to develop a factual basis for his claim in the state court.'" *Morris v. Beard*, 633 F.3d 185, 2011 U.S. App. LEXIS 1551, at *19 (3d Cir. Jan. 26, 2011) (quoting *Palmer v. Hendricks*, 592 F.3d 386, 392 (3d Cir. 2010)). Williams diligently pursued--and obtained--an evidentiary hearing in the PCRA court, during which his Batson claim was explored in detail. He is therefore not barred from seeking an evidentiary hearing in federal court.

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The District Court held that an evidentiary hearing would not advance Williams' *Batson* inquiry. Williams was afforded a full and complete hearing in the PCRA court. He was provided with the trial court's voir dire notes, as well as a document summarizing the motivation for each of the Commonwealth's peremptory strikes. The prosecutor appeared for several hours of testimony, almost all of which centered upon her voir dire strategy and state of mind. She proffered an explanation for each of her challenges and supported most of these explanations by reference to the record. The racial composition of the venire and jury was clearly established. In short, the PCRA proceeding was comprehensive. Williams identifies no potential facts which a second evidentiary hearing is likely to unearth. The District Court quite accurately observed that "[n] o additional, relevant information would be gained from a federal hearing that cannot be gleaned from the state court record." We agree. *See Morris*, 633 F.3d 185, 2011 U.S. App. LEXIS 1551, at *29- 30 (explaining that an evidentiary hearing is warranted only if there are "critical issues of material fact" that remain unresolved). The District Court's rejection of Williams' discovery requests will be affirmed.

2 Application of the *Uderra* Rule

On collateral appeal, the Pennsylvania Supreme Court determined that Williams waived his *Batson* claim because, as a matter of fact, "trial counsel did not raise a Batson objection during voir dire." *Williams II*, 863 A.2d at 514. This was an unreasonable determination of facts in light of the evidence presented in the state court

proceeding. The trial record is plain--and both parties agree--that Williams objected after the Commonwealth used its second peremptory challenge to dismiss an African American venireperson. Williams objected a second time after Foulkes exercised her fourth strike. Thus, the Pennsylvania Supreme Court's fact-finding is clearly contradicted by the record. As a result of its mistake of fact, the Court did not address the *Batson* claim on its merits.

The Pennsylvania Supreme Court did, however, indirectly address the *Batson* claim through its ineffective assistance inquiry. Specifically, Williams argued that trial counsel was ineffective for failing to insist that the Commonwealth provide race-neutral reasons for its challenges, and that appellate counsel was ineffective for neglecting to raise a *Batson* challenge on direct appeal. To assess the ineffective assistance claims, the Supreme Court queried whether Williams' underlying *Batson* challenge was meritorious. It ultimately answered in the negative after applying its then-recent precedent, *Commonwealth v. Uderra*, 580 Pa. 492, 862 A.2d 74 (Pa. 2004). *Uderra* held that when a postconviction petitioner fails to raise an adequate Batson challenge at trial, he or she is not entitled to rely upon *Batson*'s burden-shifting framework in a collateral attack; rather, the petitioner must prove actual, purposeful discrimination by a preponderance of the evidence. *Uderra*, 862 A.2d at 86-87. In Williams' case, the Pennsylvania Supreme Court held that the evidence did not meet the threshold mandated by *Uderra*. The court thus determined that the underlying Batson challenge lacked merit and, accordingly, rejected

both ineffective assistance claims. *Williams II*, 863 A.2d at 514-15. Neither ineffective assistance claim is before us today.

The Commonwealth argues that the Pennsylvania Supreme Court's application of the *Uderra* rule is reasonable and must therefore guide our inquiry into the merits of Williams' *Batson* challenge. In other words, the Commonwealth argues that we should not apply the three-step *Batson* framework, but should instead simply ask whether Williams proved racial discrimination by a preponderance of the evidence. We disagree. As explained above, the Pennsylvania Supreme Court determined that Williams waived his *Batson* claim; thus, it did not apply *Uderra* to the claim. In fact, it did not address the claim at all. *See Laird v. Horn*, 414 F.3d 419, 424 (3d Cir. 2005) (critiquing contention that a state court implicitly addresses the merits of a claim when it rules on a derivative ineffective assistance of counsel claim). What is more, the Pennsylvania Supreme Court's waiver holding is premised on an unreasonable determination of facts, namely: the faulty finding that Williams failed to raise a *Batson* objection during voir dire. Given these circumstances, we need not assess the appropriateness of the *Uderra* rule, nor will we express an opinion on whether it represents an unreasonable application of *Batson*. We now turn to the merits of this equal protection challenge.

3 *Batson* Merits

The PCRA court denied Williams' *Batson* claim on the merits: it held that there was insufficient evidence

from which to infer that the Commonwealth exercised its peremptory challenges in a racially discriminatory manner. As noted above, the Pennsylvania Supreme Court did not address this substantive determination, but instead resolved Williams' *Batson* claim on procedural grounds. The Supreme Court's procedural resolution is the only decision entitled to preclusive effect. *See Thomas*, 570 F.3d at 115. Thus, for purposes of AEDPA, the Pennsylvania state courts have not adjudicated the *Batson* claim on the merits. *See id.* at 114-15; *see also Lewis*, 581 F.3d at 100 (explaining that when a state court's final resolution of a claim is based on procedural grounds, that claim has not been "adjudicated on the merits" for purposes of § 2254(d)). No AEDPA deference is due by this Court.[16] *Lewis*, 581 F.3d at 100.

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16. The District Court incorrectly afforded AEDPA deference to the PCRA court's substantive resolution of the *Batson* claim. The District Court concluded that, although the Pennsylvania Supreme Court did not adjudicate the claim on the merits, the state courts-- in this case, the PCRA court--had resolved the claim on substantive grounds, and thus there was an "adjudication on the merits" under § 2254(d). An "adjudication on the merits" can, of course, occur at any level of the state courts. *See Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009). When the state supreme court finally resolves a claim on procedural grounds, however, the substantive determination of a lower state court is stripped of its preclusive effect. *Id.* A substantive determination that lacks preclusive effect is not an "adjudication on the merits." Id. at 114 (explaining that an "adjudication on the merits" is "a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground" (quoting *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001))). As a result, the PCRA court's *Batson* ruling was not an "adjudication on the merits."

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A *Batson* challenge presents a mixed question of law and fact on federal habeas review. *Hardcastle*, 368 F.3d at 254; *Holloway v. Horn*, 355 F.3d 707, 719 (3d Cir. 2004). When AEDPA deference does not apply, we review a mixed question of law and fact de novo. *Lewis*, 581 F.3d at 100. However, any of the state courts' pure factual determinations, whether explicit or implicit, retain the presumption of correctness mandated by AEDPA. *See id.*; *see also* § 2254(e)(1); *Simmons v. Beard*, 590 F.3d 223, 231 (3d Cir. 2009). Batson announced a three-step burden-shifting framework for judges to employ in order to determine whether racial discrimination is at work in jury selection. That procedure, which we have set forth above, requires a defendant to make out a prima facie case of purposeful discrimination before the prosecutor must articulate race-neutral justifications for her strikes. *Miller-El*, 537 U.S. at 328 (citing *Batson*, 476 U.S. at 96-98). After the parties have satisfied their respective burdens of production in these first two steps, the defendant must prove purposeful discrimination by a preponderance of the evidence. *See id.* at 328-29 (citing *Batson*, 476 U.S. at 98).

Establishment of a prima facie case requires the defendant to show that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Johnson v. California*, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) (quoting Batson, 476 U.S. at 93-94). This step is not intended to be particularly onerous, and "the defendant is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." *Abu-Jamal v. Horn*, 520 F.3d

272, 288 (3d Cir. 2008) (quoting *Batson*, 476 U.S. at 96). That said, we have emphasized that "peremptory strikes are presumptively valid" and "need not be supported by any reason" so long as they are not "exercised on an unconstitutional basis, such as race or gender." *United States v. DeJesus*, 347 F.3d 500, 505 (3d Cir. 2003).

The Supreme Court has identified at least two examples of circumstances relevant to step one's totality inquiry. First, the defendant may proffer evidence that the government exercised a "'pattern' of strikes against black jurors included in the particular venire, [which] might [then] give rise to an inference of discrimination." *Batson*, 476 U.S. at 97. Second, "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose."[17] *Id.* In the instant matter, the venire was 39% African American. The Commonwealth exercised a total of sixteen peremptory challenges; fourteen of those were used to remove African American members of the venire. Thus, the prosecutor struck African Americans at a rate of 87.5%, but struck white venirepersons at a rate of 12.5%. The District Court called this pattern "stark" and held that these statistics alone were sufficient to make out a prima facie case. That ruling is consistent with our precedents.

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17. Jurisprudence in this circuit has "identified several additional relevant factors, including how many members of the cognizable racial group are in the venire panel; the nature of the crime; and the race of the defendant and the victim." *Lewis*, 581 F.3d at 103 (internal quotations omitted).

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Statistical evidence may be sufficient by itself to make out a prima facie case of racial discrimination. *See, e.g.*, *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993); *Overton v. Newton*, 295 F.3d 270, 278 & n.9 (2d Cir. 2002) (citing cases and stating "statistics, alone and without more, can, in appropriate circumstances, be sufficient to establish the requisite *prima facie* showing under *Batson*"). In *Holloway v. Horn*, we had "little difficulty" finding a prima facie case when the prosecutor used eleven of twelve strikes to remove African American venirepersons. 355 F.3d at 722. Similarly, we found a prima facie showing in *Brinson v. Vaughn*, where the Commonwealth used thirteen of its fourteen strikes to remove African Americans. 398 F.3d 225, 234-35 (3d Cir. 2005). Additionally, our decision in *Hardcastle v. Horn* strongly implies that a prosecutor who removes twelve of fourteen African American venire members exhibits a pattern of strikes sufficient to raise an improper inference. *See* 368 F.3d at 256.

In each of these decisions, however, we were unable to fully reconstruct the racial composition of the venire. Reconstruction of the venire often provides crucial context to a prosecutor's strike rate. *See Abu-Jamal*, 520 F.3d at 291-92. For example, a strike rate of 90% looks less stark when the venire is 90% African American. When the record does not illuminate the composition of the venire, there may be insufficient evidence with which to mount a successful collateral attack. Indeed, we rejected the petitioner's challenge in *Abu-Jamal* when he established that ten of the prosecutor's fifteen peremptory strikes were used to remove African Americans, but was unable to reconstruct the composition of the venire. *See id.* at 291-92.

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What is telling about *Holloway*, *Brinson*, and *Hardcastle*--in contrast to *Abu-Jamal*--is that the pattern of strikes in these cases was sufficient to satisfy the prima facie threshold even without evidence of the venire's racial makeup. In each case, the strike rate exceeded 85%, whereas the rate in *Abu-Jamal* was 66.7%. Here, the strike rate also exceeded 85%; consistent with *Holloway*, *Brinson*, and *Hardcastle*, we find that evidence of the strike rate alone satisfies Williams' prima facie showing. After all, the Commonwealth exercised fourteen of its sixteen peremptory challenges on African Americans. In a venire that was less than 40% black, it is hardly a leap to conclude that a strike rate of 87.5% raises an inference of discrimination.

Although the strike rate data is sufficient by itself to make a prima facie showing in this case, we need not rely exclusively on the Commonwealth's strike rate. Evidence contrasting the rate at which the prosecution accepts black and white jurors may also raise an inference of discrimination. In *Bond v. Beard*, 539 F.3d 256 (3d Cir. 2008), the prosecutor accepted between 41% and 47% of the black venirepersons that he had the opportunity to strike; his acceptance rate for white members of the venire was 83%. We held that the disparity between these acceptance rates was sufficient to make out a prima facie case at step one of the *Batson* analysis. *Bond*, 539 F.3d at 270. In this case, Foulkes accepted five of the nineteen African Americans she had the opportunity to strike. Her acceptance rate was thus 26.3%. By contrast, she accepted nineteen of the twenty-one white venirepersons she had the opportunity to strike. Her acceptance rate for white

venire members was therefore 90%. Under *Bond*, this disparity raises an inference of discrimination.

In sum, Williams has proffered statistical evidence sufficient to suggest that the Commonwealth's peremptory challenges were based upon an improper motive. We must therefore proceed to step two and three of the *Batson* inquiry. The government's burden of production at step two is "relatively low," *Hardcastle*, 368 F.3d at 257; "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral," *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam) (quoting *Hernandez v. New York*, 500 U.S. 352, 360, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)). At the PCRA hearing, Foulkes provided an explanation for each of her strikes. Williams does not contend that any of Foulkes' reasons were facially illegitimate. Nonetheless, we have reviewed the record and conclude that the proffered reasons, some of which are discussed in more detail below, are facially race-neutral. The burden therefore rests upon Williams to prove that the explanations offered by Foulkes are not persuasive and are instead pretextual. *See Miller-El*, 537 U.S. at 338-39 (stating that step three of the Batson framework centers upon "the persuasiveness of the prosecutor's justification").

At step three of the *Batson* analysis, the petitioner must show that "it is more likely than not that the prosecutor struck at least one juror because of race." *Bond*, 539 F.3d at 264. To determine whether the petitioner has carried his or her burden, the court must

evaluate "all evidence introduced by each side (including all evidence introduced in the first and second steps) that tends to show that race was or was not the real reason" for each strike. *Hardcastle*, 368 F.3d at 259 (quoting Riley v. Taylor, 277 F.3d 261, 286 (3d Cir. 2001) (en banc)); *see also Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) (explaining that "all of the circumstances that bear upon the issue of racial animosity must be consulted"). Step three ultimately focuses upon the prosecutor's subjective motivation, which ideally includes an assessment of the demeanor and credibility of the various voir dire participants. *See Snyder*, 552 U.S. at 477 ("Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenges." (alteration in original) (internal citations and quotation marks omitted)). To the extent that such assessments factor into the court's final ruling, they must be accorded significant deference on appeal. *See id.* at 477; *DeJesus*, 347 F.3d at 507.

As we have stated, the PCRA court made no step-three findings. The parties nonetheless developed a significant record at the PCRA hearing and, while this is a very imperfect substitute for a trial judge's findings of fact, it permits sufficient--though hardly ideal--collateral review. In the District Court, Williams proceeded by method of comparing stricken members of the venire to individuals the Commonwealth deemed acceptable. We have previously authorized such an evaluative procedure, explaining, "A comparison between a stricken black

juror and a sitting white juror is relevant to determining whether the prosecution's asserted justification for striking the black juror is pretextual." *Riley*, 277 F.3d at 282; *Holloway*, 355 F.3d at 724; *see also Snyder*, 552 U.S. at 479-86 (performing comparative analysis); *Miller-El v. Dretke*, 545 U.S. 231, 241-52, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (finding *Batson* violation based in part on juror comparison). An explanation that appears race neutral at step two may betray an improper motive if it is invoked to strike African Americans but not other non-black venirepersons exhibiting the same characteristic. Williams focuses upon five stricken members of the venire, all of whom were African American. We will confine our comparative inquiry accordingly.

Lucille Dozier. Ms. Dozier was asked whether she had any beliefs which would prevent her "from being able to impose the death penalty in an appropriate case." She answered, "I would have to be absolutely certain, sure that this person really deserves that." After the prosecutor rephrased the question, Dozier stated that she could impose the death penalty if appropriate. At the PCRA hearing, Foulkes testified that she struck Dozier on the basis of her initial hesitancy. Foulkes explained, "[I]t appeared to me from her answers [that it would be] very difficult for her to apply the law in this case."

Williams names two comparators, both of whom were white: Debra Pagano, seated as juror number seven, and Virginia Feo, who was accepted by the Commonwealth but stricken by the defense. When Foulkes asked Pagano whether she would have any difficulty imposing the death

penalty in an appropriate case, Pagano answered, "No." Feo was posed the same question and stated that although it would not be "easy," she "did not think" she would have any difficulty imposing a penalty of death. Neither of these comparators expressed a sentiment close to that exhibited by Dozier; specifically, neither Pagano nor Feo required "absolute certainty" in order to recommend the death penalty. The comparative evidence thus fails to suggest that Foulkes' reason for striking Ms. Dozier was pretext.

Shawn Kimble. Mr. Kimble was employed as a purchasing agent, graduated from Central High School in west Philadelphia, and studied business at Drexel University. Foulkes observed that he was approximately the same age as Williams and, in her opinion, he exhibited a "hostile affect." Foulkes testified that she struck Kimble due to concerns about his attitude, his age, and because Williams asked Kimble no questions during voir dire. Furthermore, Foulkes explained that none of these factors alone moved her to exercise a challenge; rather, it was the combination of concerns that together led to the strike.

Because the PCRA court resolved the *Batson* claim at step one, it did not assess Foulkes' reasons for striking Kimble and, consequently, made no finding with respect to Kimble's alleged hostility. We cannot presume that the PCRA court credited Foulkes' assertion that Kimble displayed a hostile affect. *See Snyder*, 552 U.S. at 479 (declining to credit prosecutor's justification that stricken venireperson was excessively nervous when the state court did not make an on-the-record determination regarding venireperson's demeanor). As a result, we will

not consider the prosecutor's demeanor-based reason for striking Kimble and will instead focus upon Foulkes' remaining justifications: age and the defendant's decision not to question Kimble on voir dire.

Williams attacks these rationales by proffering two comparators to whom Williams posed no questions during voir dire, and who were nonetheless accepted by the Commonwealth. These two individuals--Isabelle Edmonson and Robert Eberle--do not constitute true comparators for purposes of our inquiry. Although Williams did not ask any questions of either Edmonson or Eberle, both were significantly older than the defendant. Therefore, neither can be said to exhibit the same characteristics as Kimble (age *and* lack of questioning). In a comparison analysis, it is insufficient to proffer venire members who lack one or more of the characteristics upon which the prosecutor exercised a strike. This is not to erect an unreasonable roadblock; rather, it ensures accuracy in an area often guided by guesswork and hunches. *See DeJesus*, 347 F.3d at 505 (explaining that a peremptory challenge "is usually based on educated guesses about probabilities based on the limited information available to an attorney about prospective jurors"). Because the focus in step three is to uncover a prosecutor's subjective motivation, it is imperative to account for the complete combination of factors that caused the prosecutor to exercise a strike. Here, it was Kimble's proximity to the defendant's age and the fact that defense counsel asked him no questions. Williams identifies no comparators that meet these criteria; therefore, his comparative evidence is unpersuasive.

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Geraldine Hill. Ms. Hill was a married mother of five living in southwest Philadelphia. During voir dire, Foulkes asked Hill, "would you surrender your belief merely because of the fact that other members of the jury, even a majority of the jury, would believe contrary to what you believe?" Hill replied, "Either way I believe, no one, and I mean no one[,] would change my mind." At the PCRA hearing, Foulkes explained her dismissal of Hill as follows:

> I have to say I can almost remember her saying this, I know that's rather remarkable, but she said that no one would change her mind if she came to a certain conclusion in the jury. Again, the way she put it, the language that she used, was such that it was not sufficient to challenge her for cause, but the emphasis that she gave that response indicated to me that if she came to a conclusion, that she was not someone who was responsive to deliberating further with her fellow jurors. And again, this is something that is a matter of affect and emphasis in the tone of how she delivered her answers.

Williams contends that Hill subsequently clarified her response, and that Foulkes' concerns were thus unreasonable. In particular, Foulkes later asked Hill, "So when you say that you make up your mind and that's it, that doesn't mean that you wouldn't be able to deliberate with your fellow jurors?" Hill answered, "No. You will have to show me where I am wrong, either way. As long as I can be shown."

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There is no question that as a result of Hill's clarification, she could not be stricken for cause. However, Foulkes' lingering concern was not unreasonable. Hill's initial assertion that "no one, and I mean no one[,] would change my mind" is emphatic and suggests that she may have difficulty deliberating with other jurors. This is not to say that she would, in fact, have had difficulty participating in deliberations; but a peremptory strike is often no more than a guess about future behavior, *see DeJesus*, 347 F.3d at 505. A prosecutor--indeed, any trial advocate--has every reason to hedge against empaneling an individual who might prove unduly obstinate. What is more, Williams proffers no comparators for Hill, rendering our post-hoc comparative evaluation of little use. Given the guesswork inherent in the jury selection process, Hill's removal does not suggest improper motives.

Lillie Moore & Dwayne Kitchen. Ms. Moore was married, worked as a keypunch operator, and lived in the Logan section of Philadelphia. Mr. Kitchen was twenty-two, resided in north Philadelphia, and was employed as a construction worker. Foulkes asked both of these venire members whether they would require the Commonwealth to prove Williams' guilt "beyond all doubt." Both answered "Yes."[18] After the prosecutor posed the question to Kitchen, the court interjected: "I don't think that's an appropriate question, and I think that you ought to not ask it anymore." It is undisputed that Foulkes posed a question to several African American and white jurors that used similar "beyond all doubt" phrasing.

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18. Subsequent clarifications by both Moore and Kitchen prevented each from being stricken for cause.

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At the PCRA hearing, Foulkes testified that she struck Moore and Kitchen because it appeared to her that both individuals would "require[] proof beyond all doubt in a serious matter like this." The court pressed Foulkes on her explanation, asking, "[I]f a juror adhered to the fact that they couldn't follow the Court's instructions concerning reasonable doubt, then [wouldn't they] be available to be challenged for cause?" Foulkes indicated that although Moore and Kitchen were rehabilitated to the court's satisfaction, she believed both "were trying very hard to satisfy the Court in their answers, that in their heart [they] really simply couldn't hold the government to a different standard than [certainty beyond all doubt]."

By way of comparison, Williams proffers juror number 176, Gloria Mastronardo. Foulkes did not ask Mastronardo a question using the "beyond all doubt" phrasing; however, Williams argues that Mastronardo's opinions regarding the death penalty are comparable to those Foulkes attributed to Moore and Kitchen. The record does not support such a contention. If anything, Mastronardo expressed views that were somewhat more receptive to imposition of the death penalty. When asked whether she had any beliefs that might prevent her from recommending death, she stated, "I used to think I would *never be against capital punishment* but perhaps--it would depend on the nature of the crime, to be honest" (emphasis added). Foulkes later asked if Mastronardo was capable of "impos[ing] the death penalty." She answered, "I believe so." In short, Mastronardo articulated none of the reservations that Moore and Kitchen expressed. Furthermore, while Foulkes posed an improperly phrased

question to both Moore and Kitchen, she posed similar questions to several other individuals of each race. Williams cannot point to any venireperson who answered the "beyond all doubt" question like Moore and Kitchen, yet who Foulkes failed to strike. We thus find no value in the comparative evidence.

Although Williams' juror-by-juror comparison evidence falls short, we are mindful that we must consider the totality of the available evidence, including that which was proffered at steps one and two of the *Batson* inquiry. *See Hardcastle*, 368 F.3d at 259. Here, Williams presents fairly strong strike-rate evidence: the prosecutor exercised fourteen of sixteen strikes to remove African Americans from a venire that was 39% black. The rate at which she struck African Americans was 87.5%, compared to a strike rate of 12.5% for white venire members. There are also less revealing statistics. The Commonwealth accepted black venire members at a rate of 26.3%. In *Bond v. Beard*, we held that at step three, an acceptance rate of 41-47% (compared to 83% for whites) was "reasonably high," and was evidence that the prosecutor was not racially motivated. 539 F.3d at 270. While the acceptance rate in Williams' case is not equivalent to *Bond*'s, it is much higher than the 9% rate criticized by the Supreme Court in *Miller-El v. Dretke*, 545 U.S. at 240-41. We find the acceptance rate data inconclusive at best.

The statistical data is but one portion of the totality that we must consider at step three. Williams was tried by a jury of five African Americans and seven white individuals. Both defendant and victim were African

American and there was no racial component to the crime. *See Lewis*, 581 F.3d at 103 (explaining that the race of the defendant and victim, and the nature of the crime, may be relevant circumstances to consider); *Abu-Jamal*, 520 F.3d at 288 n.16 (same). These facts cut in the Commonwealth's favor. Furthermore, Williams' comparative evidence was exceedingly weak. Foulkes provided plausible reasons for each of her strikes, and supported her reasons by recourse to the record. More importantly, she was consistent in the application of her reasons; she did not, for example, accept white venire members who articulated a refusal to deliberate or who would require proof beyond all doubt to return a verdict of guilt. On the totality of the record before us, the evidence offered by Williams is simply insufficient to overcome the evidence that favors the Commonwealth.[19] Accordingly, Williams' *Batson* challenge fails on its merits.

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19. Williams makes passing reference to the infamous Jack McMahon training videotape, created in 1987 and featuring former Philadelphia Assistant District Attorney Jack McMahon. In the tape, which was intended as an educational tool for young prosecutors in the Philadelphia District Attorney's Office, McMahon makes several comments suggesting that he made conscious efforts to strike qualified African Americans from the venire. *See Wilson v. Beard*, 426 F.3d 653, 656-58 (3d Cir. 2005) (recounting in detail several of McMahon's more inflammatory comments). Since its public disclosure in 1997, many defendants have sought to bolster a *Batson* claim by recourse to the tape. *See, e.g., Lewis*, 581 F.3d at 104; *Wilson*, 426 F.3d at 653; *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005). In *Lewis*, we found the tape to be of little significance where the petitioner was unable to show that the district attorney responsible for his prosecution had seen the tape or followed its recommendations. *See* 581 F.3d

Appendix P

B Accomplice Liability Instructions

Williams' second claim sounds in due process: he contends that the trial court's accomplice liability instructions permitted the jury to find that he was an accomplice to first degree murder without finding that he possessed the specific intent to kill. Intent to kill is an element of first degree murder under Pennsylvania law. 18 Pa. Cons. Stat. § 2502(a). This element must be proved whether the defendant is the principal or merely an accomplice to the homicide. *Everett v. Beard*, 290 F.3d 500, 513 (3d Cir. 2002) (explaining that "since the legislature drafted the law on first-degree murder, Pennsylvania law has clearly required that for an accomplice to be found guilty of first-degree murder, s/he must have intended that the victim be killed" (internal citations omitted)). If, as Williams argues, the charge allowed the jury to find that he was an accomplice to first degree murder without finding that he possessed the *mens rea* required for that offense, then the instructions were constitutionally infirm, for due process requires that each element of the charged offense be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *see also Smith v. Horn*, 120 F.3d 400, 410 (3d Cir. 1997) (holding that petitioner stated a due

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at 104. Similarly here, Williams cannot argue that Foulkes viewed the tape, for it was created at least one year after Williams' trial. There is no evidence that Foulkes was aware of McMahon-like practices which pre-dated the tape's creation or that she utilized such practices in any of her trials, let alone the Norwood murder trial. Thus, we find the tape to be of no significance in the instant matter.

process claim when he successfully argued that the trial court's jury instructions "had the effect of relieving the Commonwealth of its burden of proving beyond a reasonable doubt one of the elements of first-degree murder under Pennsylvania law").

Williams did not object to the accomplice liability instructions at trial, nor did he question this aspect of the charge in post-trial motions to set aside the verdict. He also did not raise the issue on direct appeal or in his PCRA petition. It was not until November 2001, when the collateral proceeding was pending before the Pennsylvania Supreme Court, that Williams filed a motion to remand to the PCRA court so that he might challenge the accomplice liability instructions. The Pennsylvania Supreme Court denied this motion. Williams raised the issue again in a second PCRA petition filed in 2005. The PCRA court dismissed this petition as untimely. *See* 42 Pa. Cons. Stat. § 9545 (requiring any PCRA petition, including a second or subsequent petition, to be filed within one year of the date that judgment becomes final). The Pennsylvania Supreme Court affirmed.

Williams then petitioned the District Court for habeas relief. The District Court held that Williams' claim was not time-barred because the PCRA's one-year statute of limitations was not firmly established and regularly applied at the time the default occurred. The Court proceeded to the merits and rejected Williams' accomplice liability claim. It concluded that even if the charge contained constitutional error, it was harmless in light of the overwhelming evidence adduced at trial.

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We begin by considering whether Williams procedurally defaulted his accomplice liability claim. The Commonwealth argues that the claim was untimely under state law and may not be reviewed by this Court. A federal habeas court cannot review a claim rejected by the state courts "'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Beard v. Kindler*, U.S. , 130 S. Ct. 612, 614, 175 L. Ed. 2d 417 (2009) (alteration in original) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)). State procedural rules, such as the PCRA's statute of limitations, are not an adequate bar to federal habeas review unless they were "'firmly established and regularly followed'" at the time the rule was contravened. *Wilson v. Beard*, 589 F.3d 651, 658 (3d Cir. 2009) (quoting *Bronshtein v. Horn*, 404 F.3d 700, 707 (3d Cir. 2005)). Williams ran afoul of the PCRA's statute of limitations when he failed to raise the accomplice liability claim in his initial petition for PCRA relief in 1996. *See Commonwealth v. Albrecht*, 994 A.2d 1091, 1093 n.2 (Pa. 2010). This default occurred well before October 20, 1998, the date by which the PCRA statute of limitations was firmly established and regularly followed. *See Morris*, 633 F.3d 185, 2011 U.S. App. LEXIS 1551, at *12- 13 (explaining that prior to October 20, 1998, Pennsylvania courts "refused to enforce procedural rules--such as the PCRA's one-year statute of limitations--in capital cases"); *Bronshtein*, 404 F.3d at 707-09 (same). Because the procedural rule under which the state courts dismissed Williams' accomplice liability claim was not firmly established and regularly followed at the time of his default, it is an inadequate bar to federal

habeas review. We will therefore proceed to the merits and consider the claim de novo. *See Lewis*, 581 F.3d at 100.

The propriety of the court's charge is closely intertwined with the evidence and argument brought forth at trial. Williams was tried alone. The Commonwealth argued that Williams and Draper perpetrated the killing together. Williams was portrayed as the principal. According to Draper, Williams hatched the plan to rob Norwood and recruited Draper to assist. Once the robbery was complete, it was Williams who decided to kill Norwood. To that end, he retrieved a tire iron and socket wrench with which to bludgeon Norwood's skull. Williams implored Draper to join him in this endeavor, and the two beat Norwood until he was bloody and lifeless. Simply put, Draper's account left no ambiguity regarding Williams' role as the principal in the offense.

This account was consistent with testimony supplied by other Commonwealth witnesses. Williams was seen driving Norwood's vehicle approximately one hour after the murder occurred. He told his friend Rucker that he "offed a guy" named Amos earlier that evening. Rucker observed blood stains on Williams' shoes. Before they parted ways on the night of the murder, Williams told Rucker that he was "going to get some gas from a gas station to go back to the scene of the crime." Police officers later discovered Norwood's body in the cemetery, charred beyond recognition.

The Commonwealth's narrative sharply conflicted with Williams' account. He claimed that on the day

of the murder, he had seen Norwood, Draper, and an acquaintance named Michael Hopkins riding in Norwood's blue Chrysler LeBaron. They apparently pulled up alongside Williams, and Draper indicated that they were headed to Draper's mother's residence on Roumfort Road. Williams asked for a ride because he happened to be going to a party in the same vicinity. When the foursome neared the cemetery, Draper and Hopkins--but not Williams--allegedly assaulted Norwood. Williams stated that he was unaware that his friends intended Norwood any harm. But when they initiated the assault, Williams allegedly became agitated, demanded that Draper and Hopkins abandon their criminal endeavor, and then exited the vehicle when they refused. Williams claimed that he then walked to the residence of an acquaintance and borrowed bus fare to return home. As Williams told it, he was not part of the robbery and was not present when Norwood was killed.

The jury was thus presented with a stark choice: either Williams was the principal in a first degree murder or he was ignorant of his friends' plans and nowhere near the cemetery when the killing occurred. Neither party argued that Williams was an accomplice to robbery or murder. Rather, both the prosecutor and defense counsel stressed their contrasting narratives. Foulkes was blunt: she called Williams "a person who commits atrocious, murderous, malicious acts and then spends the rest of his days lying, covering up, . . . trying to make things seem as they're not." And she emphasized, over and over again, that Williams was a murderer who intended to kill. Defense counsel, by contrast, urged the jury to adopt Williams' version of events and attempted to demonize Draper as a

liar. Several times he succinctly summarized the all-or-nothing proposition facing the jury: "If you believe Mr. Williams, you will acquit him of all charges." Accomplice liability was simply not in play.

In light of these conflicting accounts, the trial court's decision to provide an accomplice liability charge is rather curious.[20] Nevertheless, after charging the jury on the elements of various degrees of murder (and accompanying *mens rea* requirements), voluntary manslaughter, robbery, and criminal conspiracy, the court stated, in pertinent part,

> You may find a defendant guilty of a crime without finding that he personally engaged in the conduct required for commission of that crime or even that he was personally present when the crime was committed.
>
> An accomplice is one who either plans, cooperates, assist[s], counsels or otherwise aids in the perpetration of the crime.
>
> A defendant is guilty of a crime if he is an accomplice of a person who commits that crime. The defendant does not become an accomplice merely by being present at the scene or knowing about the crime. He is an accomplice if, with the

20. During oral argument before the District Court, the parties were asked why the accomplice liability instruction was given. Neither could provide an answer.

> intent of promotion or facilitating commission of the crime, he solicits, commands, encourages or requests the other person to commit it or aids, or agrees to aid or attempts to aid the other person in planning or committing it.
>
> However, a defendant is not an accomplice if before the other person commits the crime, he stops his own efforts to promote or facilitate the commission of the crime, and wholly deprives his previous efforts of effectiveness or gives timely warning to the law enforcement authority or otherwise makes a proper effort to prevent the commission of the crime.
>
> You may find the defendant guilty of a crime on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed, and that the defendant was an accomplice of the person who committed it.

Williams argues that this instruction "unconstitutionally broadened the scope of accomplice liability" because it permitted the jury to find that he was an accomplice to first degree murder without finding that he possessed the specific intent to kill. If the theory of accomplice liability were a viable one in this case, Williams might have a point. But it is not. Accordingly, the trial court's charge reveals no deficiency of constitutional dimension.

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To show that a jury instruction violates due process, a habeas petitioner must demonstrate both (1) that the instruction contained "some 'ambiguity, inconsistency, or deficiency,'" and (2) that there was "'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Waddington v. Sarausad*, 555 U.S. 179, 129 S. Ct. 823, 831, 172 L. Ed. 2d 532 (2009) (quoting *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004) and Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)). Satisfaction of this two-part inquiry requires a federal habeas court to "focus initially on the specific language challenged," *Smith*, 120 F.3d at 411 (citation and internal quotation marks omitted), and then to review the challenged instruction in the context of the entire charge and in light of the evidence and arguments presented at trial. *Estelle*, 502 U.S. at 72 ("[T]he instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973))); *Waddington*, 555 U.S. 179, 129 S. Ct. at 833 (analyzing accomplice liability charge in light of parties' closing arguments). In this fashion, a due process analysis depends as much on the language of the court's charge as it does on the particularities of a given case. In other words, the inquiry requires careful consideration of each trial's unique facts, the narratives presented by the parties, the arguments counsel delivered to the jurors before they retired to deliberate, and the charge as a whole. *See Waddington*, 555 U.S. 179, 129 S. Ct. at 831-33; *Estelle*, 502 U.S. at 72.

Here, even if the trial court's accomplice liability charge was in some respect ambiguous, there is no reasonable likelihood that the jury applied the instruction in a manner that relieved the Commonwealth of its burden of proof with respect to first degree murder. The trial record makes this point plain: all of the evidence and argument indicated either that Williams was the principal killer--with the specific intent to kill--or that he played no role in the robbery and murder. There simply was no viable third option. The charge as a whole reflected this stark choice. The court mentioned the concept of accomplice liability sparsely. Its first degree murder instructions did not mention the concept of accomplice liability at all.[21]

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21. The first degree murder instruction explained that the jury must first determine whether Williams participated in the murder and, if he did so, whether he acted with a *mens rea* sufficient to meet the first degree murder standard:

> If you find the *defendant* guilty of murder; that is, an unlawful killing with malice, you must then determine whether he is guilty of murder of the first degree, murder of the second degree, or murder of the third degree.
>
> Murder of the first degree is a criminal homicide committed with a specific intent to kill... Therefore, in order to find the *defendant* guilty of murder in the first degree, you must find that the killing was a willful, deliberate and premeditated act.

(emphasis added). The prosecutor's closing argument was consistent with these instructions. She repeatedly highlighted evidence of Williams' intent, stating, for example, "That, ladies and gentlemen, is murder in the first degree, because . . . his actions supply the inference that the defendant intended to take life[.]

Instead, the charge (rightly) focused on Williams' actions and mental state. Thus, although the court provided instruction on the theory of accomplice liability, it appears to have done so out of oversight or, perhaps, carelessness. In either event, the mere provision of this stray instruction does not alter the fact that accomplice liability was a theory for which there was no evidentiary support. By including the instruction in the final charge, the court did not violate Williams' right to due process.[22]

Finally, Williams contends that the trial court's instruction was nearly identical to the accomplice liability instruction that we held to be constitutionally deficient in *Laird v. Horn*, 414 F.3d 419 (3d Cir. 2005). In *Laird*, co-defendants Laird and Chester left a bar along with a third individual named Milano. Milano's body was discovered

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. . . [H]e expressed, by his action, a specific intention, above and beyond the robbery, to kill [Norwood], to kill him for the purpose whatever, for whatever purpose." In a due process challenge, a strong consistency between argument and charge makes it more likely that the jury understood the requirements of the law and applied those requirements correctly. *Cf. Smith v. Horn*, 120 F.3d 400, 404-05 (3d Cir. 1997) (finding infirmity when prosecutor urged jury to apply erroneous theory of accomplice liability).

22. Williams suggests that even if provision of the accomplice liability instruction was unnecessary, we must nonetheless acknowledge the fact that the theory was presented to the jury. As such, the jury may have concluded that Williams was an accomplice to first degree murder. On habeas review, we do not deal in "may haves." The appropriate question is whether the outcome proposed by Williams was reasonably likely. *See Waddington v. Sarausad*, 555 U.S. 179, 129 S. Ct. 823, 831-32, 172 L. Ed. 2d 532 (2009). Our answer to this question is a resounding No.

the following evening in a nearby wooded area. Laird and Chester were tried together for, *inter alia*, murder, kidnapping, aggravated assault, false imprisonment, and conspiracy. Both took the stand and admitted that they participated in the kidnapping and were present for Milano's death. *Id.* at 422, 426. Each denied that he intended for Milano to be killed. *Id.* at 422. Laird accused Chester of killing Milano and vice versa. *Id.* at 422, 426. The jury convicted both defendants of an array of offenses, including first degree murder, kidnapping, aggravated assault, and conspiracy.

The trial court in *Laird* provided an accomplice liability instruction that was almost identical to the instruction given in Williams' case, but the similarities between the two proceedings essentially end there. *Laird* was a two-defendant trial wherein both of the accused admitted their participation in some aspect of the crime--i.e., the kidnapping. *See id.* at 426. Neither co-defendant, however, admitted he was an accomplice to the actual homicide. It was therefore imperative for the charge to distinguish between Laird's acknowledged role as an accomplice to kidnapping and his disputed role as accomplice to first degree murder. Yet the trial court failed to make such a distinction, and failed to explain that an accomplice to kidnapping is not necessarily an accomplice to murder. Given the circumstances present in the case, it was incumbent upon the trial court to ensure that the jury understood "that an accomplice for one purpose is [not] an accomplice for all purposes." *Id.* at 427 (quoting *Smith*, 120 F.3d at 414). To put it differently, under the *Laird* charge, the jury reasonably could have concluded

that because Laird was an accomplice to kidnapping, he must also have been an accomplice to murder.

The problem in *Laird* was not the accomplice liability instruction's linguistic imprecision per se. Rather, the instructional ambiguity worked a critical error when viewed in the context of the trial record as a whole. Williams does not acknowledge this aspect of the holding. Instead, he argues that the similarity of both instructions demonstrates constitutional error. But as we indicated above, a rote comparison of the two instructions is insufficient in a due process inquiry. *See Waddington*, 555 U.S. 179, 129 S. Ct. at 831-33; *Estelle*, 502 U.S. at 72. Although the trial judge in *Laird* provided an accomplice liability instruction that was nearly identical to that rendered here, there was a profound difference between each proceeding's evidence, argument, and the charges as a whole. That difference is dispositive. In *Laird*, the ambiguity in the charge, coupled with the balance of pertinent considerations, made it reasonably likely that the jury applied the instruction in a manner which relieved the Commonwealth of its burden of proof. There is no such likelihood here. Williams' testimony--unlike that provided by the co-defendants in *Laird*--attempts to exculpate him completely. Accomplice liability is simply not in play.

In sum, we find that the trial court's accomplice liability instruction was not constitutionally infirm. Williams' arguments to the contrary are without merit.[23]

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23. Williams also claims that both his trial counsel and his counsel on direct appeal were ineffective for neglecting to challenge the accomplice liability instruction. Because this claim

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C Ineffective Assistance of Counsel

Williams' final claim invokes the Sixth Amendment right to effective counsel. Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), criminal defendants are entitled to effective representation at both the guilt and penalty phases of trial. To establish a constitutional violation under *Strickland*, a defendant must demonstrate that counsel's performance was deficient, and that it prejudiced the defense. *Id.* at 687-88. Where a *Strickland* claim is raised on federal habeas review, however, the petitioner must not only show deficient performance and prejudice; in addition, he or she must show that "the state court's rejection of [the] claim of ineffective assistance of counsel was 'contrary to, or involved an unreasonable application of *Strickland*, or it rested 'on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Porter v. McCollum*, U.S. , 130 S. Ct. 447, 452, 175 L. Ed. 2d 398 (2009) (per curiam) (quoting § 2254(d)).

Williams contends that he received deficient legal representation during the trial's penalty phase. Specifically, he claims that Panarella--his trial counsel--failed to conduct a reasonable investigation into his background. Such an inquiry would have revealed extensive evidence of physical and sexual abuse, as well as sundry concerns with Williams' mental health. This evidence, in turn, could

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lacks merit, neither counsel was ineffective for failing to pursue it. *See Premo v. Moore*, U.S. , 131 S. Ct. 733, 741, 178 L. Ed. 2d 649 (2011); *Werts v. Vaughn*, 228 F.3d 178, 203 (3d Cir. 2000).

have been presented to the jury to mitigate the brutality of Williams' offense, or so the argument goes.[24] Panarella instead opted to portray the defendant as a capable young man for whom the crime was but an aberration. He did not present evidence of sexual abuse or mental impairment, and there was only a passing reference to Williams' physically abusive stepfather. The jury evidently rejected Panarella's characterization, for it concluded that there were no circumstances that mitigated the severity of the offense.[25]

Williams raised this ineffective assistance of counsel claim in his petition for PCRA relief. Prior to ruling on the petition, the PCRA court heard several days of testimony. Three mental health experts testified that Williams was psychologically damaged at the time of the offense. At least eight additional witnesses took the stand and

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24. Mitigating circumstances are set forth by statute under Pennsylvania law. *See* 42 Pa. Cons. Stat. § 9711(e). Had Panarella presented the evidence described above, Williams argues that the jury could have found either that he "was under the influence of extreme mental or emotional disturbance," § 9711(e)(2), or that his "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired," § 9711(e)(3). Williams also contends that the jury could have found that the "catch-all" mitigation provision set forth in § 9711(e)(8) was applicable. *See* § 9711(e)(8) ("Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.").

25. Most notably, the jury did not find that Williams' age was a mitigating factor in the offense. This finding is significant, and we address it in more detail below.

detailed the physical and sexual abuse to which Williams was subjected throughout his youth. Finally, Panarella testified concerning his performance at trial. At the conclusion of these proceedings, the PCRA court denied the ineffective assistance of counsel claim on its merits. The Pennsylvania Supreme Court affirmed, holding that Williams did not meet "his burden of demonstrating there was [a] reasonable probability the presentation of [prior abuse and mental health] evidence would have resulted in a life sentence instead of the death penalty." *Williams II*, 863 A.2d at 521 n. 12.

On federal habeas review, the District Court concluded that Panarella's penalty-phase performance was constitutionally deficient. The Court explained: "Panarella's efforts fell far short of . . . prevailing professional norms, and the explanations he provided during post-trial and PCRA hearings reflected inattention to the penalty phase rather than tactical decision making." On step two of the *Strickland* inquiry, however, the Court concluded that under AEDPA's deferential standard of review, it could not find that Panarella's performance was prejudicial to the defense. Accordingly, the District Court denied Williams' claim. We exercise plenary review over this decision. *See Lewis*, 581 F.3d at 100.

We will not revisit the District Court's determination that Panarella was constitutionally ineffective during the trial's penalty phase. We instead accept this finding for purposes of our present analysis and proceed to the prejudice inquiry. *See Wong v. Belmontes*, U.S. , 130 S. Ct. 383, 386, 175 L. Ed. 2d 328 (2009) (per curiam) (assuming,

for purposes of analysis, that counsel's performance was deficient when prejudice inquiry was dispositive). The Pennsylvania state courts resolved Williams' ineffective assistance claim on the merits; our review of the issue is thus governed by principles of AEDPA deference. *See Lewis*, 581 F.3d at 100. We apply these principles to the holding of the Pennsylvania Supreme Court because it provides "the 'last reasoned decision' of the state courts" on the *Strickland* claim. *Simmons*, 590 F.3d at 231-32 (quoting *Bond*, 539 F.3d at 289-90). Under § 2254, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, U.S. , 131 S. Ct. 770, 785, 178 L. Ed. 2d 624 (2011). This means that a habeas petitioner "must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance"; to prevail, the petitioner must demonstrate that the state court "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 698-99, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *see also Harrington* U.S. , 131 S. Ct. at 786 ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004))).

To establish prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is one "sufficient to undermine

confidence in the outcome." *Id.* The *Strickland* prejudice standard is not "stringent"--it is, in fact, "less demanding than the preponderance standard." *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001) (quoting *Baker v. Barbo*, 177 F.3d 149, 154 (3d Cir. 1999)); *see also Woodford v. Visciotti*, 537 U.S. 19, 22, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (explaining that *Strickland* "specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered"). In a capital case arising from the Pennsylvania state courts, prejudice exists if there is a reasonable probability that, but for counsel's deficient performance, "one juror [would have] voted to impose a sentence of life imprisonment rather than the death penalty." *Bond*, 539 F.3d at 285 (citing 42 Pa. Cons. Stat. § 9711(c)(1)(iv)).

A careful prejudice inquiry requires that we "consider *all* the relevant evidence that the jury would have had before it if [counsel] had pursued [a] different path." *Wong*, U.S. , 130 S. Ct. at 386. This includes evidence that was adduced at trial as well as that which was not presented until postconviction review. *See Porter*, U.S. , 130 S. Ct. at 454. Stated differently, we must reconstruct the record and assess it anew. In so doing, we cannot merely consider the mitigation evidence that went unmentioned in the first instance; we must also take account of the anti-mitigation evidence that the Commonwealth would have presented to rebut the petitioner's mitigation testimony. *See Wong*, U.S , 130 S. Ct. at 390 (stating that "the reviewing court must consider all the evidence--the good and the bad-when evaluating prejudice"). Once we have reconstructed the record, we must "reweigh the evidence in aggravation

against the totality of available mitigation evidence." *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Only then may we ask whether there is a reasonable probability that, but for counsel's ineffectiveness, the result of the proceeding would have been different.

Accordingly, we begin by reconstructing the record. We will then reweigh the totality of the evidence and assess whether Panarella's deficient performance prejudiced the defense.

1 Reconstructing the Record

The trial's penalty phase was a brief affair. For the Commonwealth, assistant district attorney Jeffrey Kolansky took the stand and supplied the basic facts regarding the Dorfman robbery. He stated that the incident occurred on December 24, 1982; that the victims were Don and Hilda Dorfman, aged sixty-nine and sixty-four, respectively; that Williams was sixteen years of age at the time of the offense; that Williams entered the Dorfmans' home carrying a .22 caliber Winchester rifle, pointed it at Mrs. Dorfman and fired it three times above Mr. Dorfman's head; and that Williams was convicted of two counts of first degree robbery, one count of burglary, one count of simple assault, one count of unauthorized use of an automobile, and one count of conspiracy. Next, Philadelphia police detective Lawrence Gerrard provided testimony pertaining to the Hamilton murder. He explained that the incident occurred on January 26, 1984; that Hamilton was stabbed approximately twenty

times; that the murder weapon was left lodged in the back of Hamilton's neck; that Williams was seventeen years of age at the time of the offense; and that Williams was convicted of third degree murder, theft by unlawful taking, and possession of an instrument of a crime. Finally, Philadelphia Quarter Sessions court clerk Margie Frazier described the sentences imposed for each of these offenses.

Williams presented three witnesses: his mother, Patricia Kemp; his girlfriend, Marlene Rogers, and his first cousin, Willie Dino James. Each witness testified to Williams' general good nature and athletic success. In something of an understatement, the Pennsylvania Supreme Court found that this rather generic testimony was "not compelling." *Williams II*, 863 A.2d at 520.

Kemp did provide limited evidence on cross examination regarding her son's childhood abuse. She denied abusing Williams herself--a point she would contradict ten years later at the postconviction proceeding--but she stated that Williams' stepfather, Ernest Kemp, was "abusive to my son." She continued:

> He [Ernest Kemp] didn't care about [Williams]. He accused my son of doing things, having girls in the room. That was a lie.
>
> My son would be asleep at night, and he [Ernest] would be drunk and he would come in and bust in the room and say he [Williams] has somebody in there, and my son had called my job, and I had told Terry to go down to Mom's. That's a

> lady on the street that helped me raise my son, Mrs. Easton, and I would send him down there with her because my husband [Ernest], that I am married to now, yes, was very abusive to Terry, was very nasty to Terry.
>
> He pushed Terry down a flight of steps because Terry was on the phone that I paid for.

Kemp was not asked to elaborate on these statements on redirect examination and no additional abuse testimony was elicited by either party.

In her closing argument, the prosecutor emphasized Williams' prior convictions and his predilection for violence. She underscored that Williams "has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them." According to the Commonwealth, Williams was a violent individual whose behavior would have continued escalating had he not been apprehended.

Panarella's closing focused on his client's youth. He stressed the fact that Williams was only four months past his eighteenth birthday at the time he committed the offense and he explicitly asked the jury to find that age was a circumstance that mitigated Williams' culpability for the crime. Additionally, Panarella argued that Williams' life sentence would be one of extreme hardship; Williams would be deprived of the privileges of fatherhood, and he would be exposed to "all of the brutalities that are

associated with prison life." Panarella concluded by appealing to the jury's sense of justice. He stated, "I ask you to spare Mr. Williams' life. I can say to you that justice is always tempered with mercy but let me say to you that inflicting the death sentence in this case, I believe, is inappropriate."

The jury rejected this plea. It determined that two aggravating circumstances were applicable: (1) the murder occurred during the commission of a felony (robbery), 42 Pa. Cons. Stat. § 9711(d)(6), and (2) Williams had a significant history of felony convictions involving the use or threat of violence, 42 Pa. Cons. Stat. § 9711(d)(9). It also found that Williams was not entitled to any of the statutory mitigating circumstances set forth in 42 Pa. Cons. Stat. § 9711(e), including the provision that accounts for a defendant's age at the time of the offense, § 9711(e)(4). The jury then weighed the aggravating factors and returned a sentence of death.

At the PCRA hearing approximately twelve years later, a very different picture of Williams emerged. No fewer than eight witnesses came forward to describe a childhood plagued by frequent physical and sexual abuse. Kemp testified (in direct contradiction to her penalty phase testimony) that she "would beat Terry very often because he was smart mouthed." When Williams was in the sixth grade, Kemp met her son at school, publicly "beat him like Muhammad Ali," and then threw him down a flight of stairs. One of Williams' teachers, James Villareal, confirmed that Kemp frequently beat her son, often in public when she would retrieve him from school.

Villareal said that Kemp would hit her son "in a fierce way" and typically for no apparent reason.

Kemp was not the only source of Williams' physical abuse. His brother Thomas, some ten years Williams' senior, testified that he physically "disciplined" his younger sibling. He once threw Williams down a flight of stairs and, on a separate occasion, attempted to shoot him with a rifle. Williams' older sister, Theresa, was also beaten on a routine basis by her mother. Kemp enlisted Williams' assistance in this endeavor; on more than one occasion, Williams was told to hold his sister while Kemp beat her with an electrical cord.

Williams was approximately ten years old when Kemp married Ernest Young. Several witnesses described Young as a "drunk" who became physically violent in the throes of intoxication. Kemp said that her husband was "very cruel, very nasty," and that he often "tr[ied] to fight my children." Young typically directed his anger toward his wife; when she was not around, however, he fought with Williams. In order to escape this environment, it was not uncommon for Williams to flee the home and stay with neighbors, sometimes for days on end.

There was also sexual abuse. When Williams was very young, perhaps around the age of six, he was sodomized by a neighbor boy five years his senior. In his early teens, he was repeatedly molested by a teacher. At thirteen, Williams met and began a relationship with Norwood. Norwood was cruel and physically abusive at times; he once allegedly beat Williams with a belt. When Williams

was approximately fifteen, he was attacked by an older male while staying in a boys' home. The assailant held a weapon to Williams' neck and forced him to perform fellatio.[26]

Three mental health experts testified on Williams' behalf. First, Dr. Julie Kessel, a forensic psychiatrist, explained that she conducted a mental health evaluation during a four-hour interview with Williams in 1998. She diagnosed Williams with an array of chronic impairments: major depression with periods of recurrent psychosis and paranoia; post-traumatic stress disorder; polysubstance abuse; and borderline personality disorder. According to Dr. Kessel, each of these conditions was present in 1984. She therefore opined that Williams was suffering from extreme mental or emotional disturbance when he killed Norwood, and that he was substantially impaired in his capacity to appreciate the criminality of his conduct and to conform his actions to the requirements of the law.

The second mental health expert presented by the defense was Dr. Patricia Fleming, a clinical psychologist who interviewed Williams in 1996 for a period of seven hours and administered a battery of psychological tests. Dr. Fleming explained that Williams was "mentally

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26. The Commonwealth assails these allegations of sexual abuse by pointing out that not one of the purported incidents was contemporaneously reported to medical or law enforcement officials. In fact, all of the sexual abuse testimony is based upon statements provided in anticipation of the PCRA hearing. As such, the Commonwealth's point is well taken and we factor it into our prejudice analysis accordingly.

ill"-among other afflictions, he suffered from post-traumatic stress disorder and was extremely passive-aggressive. Williams' personality was marked by its impulsivity; Dr. Fleming repeatedly described him as "rageful" and testified that Williams "tended to keep his anger repressed until it exploded." In the year before he murdered Norwood, Williams' "behavior was out of control" and getting worse. This rage was accompanied by a "high level of paranoia," depressive symptoms, suicidal ideation, and sleep disorder. In sum, Dr. Fleming was of the opinion that Williams killed Norwood under the influence of extreme mental or emotional disturbance, and that at the time of the offense, he was unable to appreciate the criminality of his conduct or conform his conduct to the requirements of the law.

The final mental health expert for the defense was Dr. Ralph Kaufman, a clinical psychiatrist. Dr. Kaufman interviewed Williams on three separate occasions in 1996 for approximately ten hours in total. Dr. Kaufman echoed the findings of Drs. Kessel and Fleming: he stated that Williams exhibited symptoms of depression, suicidal ideation, anxiety, hypervigilance, identity difficulties, and psychotic decompensation. Furthermore, Williams suffered from posttraumatic stress disorder and was prone to impulsivity. As a result of these afflictions, Dr. Kaufman opined that Williams was under the influence of extreme mental or emotional disturbance when he killed Norwood. Dr. Kaufman could not say, however, whether Williams was unable to conform his conduct to the requirements of the law.

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These three defense experts were generally consistent in tracing the origins of Williams' mental impairment. All identified recurrent childhood abuse--especially sexual abuse--as a principal cause of Williams' later psychological disorders. There was unanimous agreement that the assault at the boys' home was a "major" or "acute" trauma, one which contributed significantly to the onset of post-traumatic stress disorder. Dr. Fleming testified that it caused Williams to suffer a "psychological breakdown." He began to self-mutilate and to fantasize about suicide. He also started to experience nightmares in which he was sexually assaulted by older men wielding dangerous weapons. Williams developed an intense anger toward males who "he felt were [sexually] interested in him, whether they made advances or not." Dr. Kessel summarized the end result of this abuse: "Every act of sexual behavior with a man would further sort of humiliate him personally and would increase his rage, which he described had been increasing. He has intense rage towards male homosexuals." Dr. Fleming called the boys' home assault "a true break." Afterwards, Williams "couldn't control himself" or contain his anger.

Not every mental health professional agreed with the opinions set forth above. In fact, Williams was subjected to several psychiatric evaluations contemporaneous with his crime spree in the mid-1980s; these evaluators uniformly concluded that Williams was mentally competent and, while perhaps somewhat maladjusted, he was not cognitively impaired. Had these evaluations been presented at the trial's penalty phase--in rebuttal to mitigation testimony offered by Williams--they surely would have bolstered

the Commonwealth's depiction of a mentally competent, calculated murderer. This is not to say that the conclusions in these reports were unassailable. However, the reports dilute the strength of the mental health characterization proffered by Williams at the PCRA hearing, and they therefore constitute important anti-mitigation evidence. We must consider such evidence as part and parcel of the prejudice inquiry. *See Wong*, U.S. , 130 S. Ct. at 390.

On February 27, 1985, Williams was examined by Dr. Edwin Camiel. At the time, then-nineteen-year-old Williams had been incarcerated for eight months on charges that he murdered Norwood. Williams was "obviously anxious and his behavior was characterized by agitation and hand [w]ringing." Williams told Dr. Camiel, "I can't cope with this." He reported a sensation of pressure throughout his body. Dr. Camiel recorded several clinical observations. He stated that Williams "appeared to be developing a paranoid delusional system"; that he could "detect no gross abnormalities in [Williams'] cognitive functioning"; and that Williams' "[j]udgment making capacity appeared to be somewhat impaired and his responses to social judgment questions indicated a tendency to respond impulsively to a stressful situation in a self-centered manner without regard to the consequences of his behavior for others." In Dr. Camiel's opinion, Williams' condition revealed "evidence of a developing Psychotic Disorder of a paranoid type.... This is the first evidence of psychiatric illness in this Defendant and the clinical picture is consistent with a diagnosis of a Schizophreniform Disorder or a briefly active psychosis secondary to the stress of his present incarceration."

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Dr. Camiel's evaluation is notable because it observed the early stages of Williams' psychological difficulties and attributed their onset to circumstances subsequent to Norwood's murder. The report stated that Williams is *developing* a psychotic disorder. It portrays this turn of events as "the first evidence of psychiatric illness in this Defendant." Dr. Camiel explained that this *developing* impairment is consistent with a diagnosis of schizophreniform disorder, which by its very nature connotes a short-term ailment lasting from one to six months.[27] This time frame is important, for it suggests that the disorder described by Dr. Camiel did not manifest itself until *after* Williams killed Norwood. Furthermore, it indicates that eight months after the murder, Dr. Camiel detected no permanent abnormalities in Williams' cognitive function. According to Dr. Camiel, Williams' newfound psychological complications were secondary to "the stress of his present incarceration."[28] Dr. Camiel therefore recommended immediate psychiatric treatment "in order to prevent the progression of symptoms to the development of a full blown psychotic disorder."

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27. Williams' experts acknowledged as much. Dr. Kessel stated that "schizophreniform psychosis [refers to] overt symptoms lasting under six months. . . . If it is longer than six months, we tend to call it schizophrenia." Dr. Fleming agreed, explaining that to be diagnosed with schizophreniform disorder, "the symptoms have to have lasted from one month to six months."

28. Dr. Camiel examined Williams two days after he was convicted of third degree murder for the Hamilton killing. It was also Williams' nineteenth birthday.

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In spite of the apparent discord between the Camiel report and the mental health narrative offered by the defense, Drs. Kessel and Fleming testified that Dr. Camiel's findings were consistent with the opinion that Williams was severely mentally impaired when he committed the crime.[29] Dr. Kessel explained, "The kind of paranoia he's demonstrating [in the Camiel Report] and the anxiety level and his agitation would certainly be consistent with a post-traumatic stress disorder [patient] who has also got an underlying tendency to become psychotic." In Dr. Kessel's view the appearance of the symptoms was simply the latest complication for a longsuffering victim of psychological disorder.

But Dr. Camiel was not the only professional to find Williams mentally competent around the time of the offense. On January 14, 1983, Dr. Anthony Zanni examined Williams in anticipation of his certification hearing for the Dorfman robbery. Williams was sixteen years of age. Dr. Zanni stated that Williams' "contact with reality was good"; he "has never had persecutory delusions"; and he "has never had visual or auditory hallucinations." In addition, Williams' "[i]nsight and judgment are not impaired." Dr. Zanni diagnosed Williams with conduct

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29. Drs. Kessel, Fleming, and Kaufman each criticized aspects of Dr. Camiel's report as well. Dr. Fleming stated that Dr. Camiel "didn't have the luxury . . . of having a lot of background information." Dr. Kessel testified that Dr. Camiel's report was "not particularly in depth." None of the defense doctors agreed that Williams' psychological difficulties were caused by stress related to incarceration. According to Dr. Fleming, the symptoms were too serious to be caused by incarcerative stress.

disorder and concluded that he was certifiable to stand trial as an adult.

Williams was examined again on March 14, 1984 by Dr. Melvin S. Heller. He was eighteen. According to Dr. Heller, Williams "show[ed] no evidence of mental impairment" and was "[w]ithout psychosis." Williams exhibited "no signs of psychotic thought disorder, delusions, hallucinations, inappropriate affect, inadequate attention span or bizarre behavior." Moreover, there was "no indication that [Williams was] operating under any undue mental or emotional stress," and Dr. Heller indicated that Williams' "prospects for community adjustment would appear to be most favorable." Three months after Dr. Heller's evaluation, Williams murdered Norwood. He had killed Hamilton just two months prior. Thus, the Heller report captured Williams in the midst of his crime spree. Its contents are difficult to reconcile with the testimony of Drs. Kessel, Fleming, and Kaufman.

One additional category of anti-mitigation evidence bears consideration: during Williams' certification proceeding in January 1984, approximately ten to fifteen witnesses-- Williams' family and friends--provided testimony portraying Williams' home life as stable, loving, and supportive. Williams was, for example, engaged in "honest" pursuits; he was a football star with pending scholarship offers; he was a "bright young man" with a "wonderful future." Marlene Rogers and Lucille Rogers (mother of Marlene and grandmother of Williams' child), echoed this theme in 1984. Both returned for the PCRA hearing in 1998 and changed their tune, characterizing

Williams' home life as a "terrible situation" permeated by "abusive behavior."

There was additional evidence, contemporaneously provided, suggesting that Williams' home life was not as nightmarish as that which he depicted on collateral review. Williams' mother repeatedly told probation officers that her relationship with her son was "satisfactory." At trial, she flatly denied inflicting any abuse. She certainly never mentioned a single instance of sexual abuse. What is more, Williams himself echoed these sentiments, telling at least one probation officer that "he had a happy childhood," and was "inspired" by his family, neighbors, and coaches. Williams never provided contrary testimony under oath.

To acknowledge testimony portraying Williams' upbringing in a positive light is not to reject the PCRA narrative of lifelong physical and sexual abuse. However, the parade of witnesses who testified at the certification proceeding described Williams' home life very differently than those who appeared at the PCRA hearing. Similarly, the testimony provided by Williams' mother could scarcely have been more contradictory. For purposes of our prejudice inquiry, it is the fact of inconsistency that is important. If nothing else, the Commonwealth could have used the certification testimony to considerable advantage by impeaching the PCRA narrative. The opportunities for attacking the credibility of those who depicted Williams' life of near-constant abuse would have been legion, thereby diluting the effectiveness of the proffered mitigation evidence. Our consideration of the reconstituted record simply cannot ignore such pointed anti-mitigation evidence.

2 Assessing the Evidence

In order to show prejudice, Williams must establish that there is a reasonable probability that but for Panarella's deficient performance, "one juror would have voted for life imprisonment rather than the death penalty." *Bond*, 539 F.3d at 289. Even if he successfully makes such a showing, however, Williams must then demonstrate that the Pennsylvania Supreme Court's contrary holding was unreasonable. *See Harrington*, U.S. , 131 S. Ct. at 786 (stating that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable"). Overcoming this hurdle is no simple undertaking; as the Supreme Court has recently stressed, the "standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Id.* at 788 (quoting *Knowles v. Mirzayance*, U.S. , 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009)).

In reviewing Williams' mitigation evidence, the Pennsylvania Supreme Court held that Panarella's failure to present this information at the penalty phase did not prejudice Williams' defense.[30] On federal habeas review,

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30. Williams argues that the Pennsylvania Supreme Court unreasonably applied *Strickland* because it "articulated an incorrect prejudice standard." He is wrong. The Court's opinion twice sets forth its prejudice standard: in the first instance, the Court states that a petitioner cannot prevail on an ineffective assistance claim "where there is no showing that [mitigating] testimony . . . would have been beneficial in terms of altering the outcome of the penalty phase hearing," *Commonwealth v. Williams (Williams II)*, 581 Pa. 57, 863 A.2d 505, 519 (Pa. 2004)

the District Court concluded that the Pennsylvania Supreme Court's decision was not an unreasonable application of Strickland. We agree.

(internal quotation omitted); in the second instance, the Court concluded that "appellant has not met his burden of demonstrating there was [a] reasonable probability the presentation of this evidence would have resulted in a life sentence instead of the death penalty," *id.* at 521 n.12. Both articulations are reasonable under Strickland; the latter parrots language of the decision itself. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Nonetheless, Williams fixates upon the Pennsylvania Supreme Court's lone reference to a petitioner's "heavy" burden when attempting to establish prejudice. *See Williams II*, 863 A.2d at 519 ("Appellant has not met this heavy burden."). Williams argues that by using such a descriptor, the Court actually imposed a burden much more stringent than the "reasonable probability" requirement set forth in *Strickland*. We cannot agree. Although the Pennsylvania Supreme Court's choice of words was imprecise, there is no indication that the Court in fact held Williams to an incorrect prejudice standard. It twice articulated a standard consistent with *Strickland*, and it is clear from the Court's opinion that it did not consider the mitigation evidence to be the least bit persuasive. We find that by describing Williams' burden as "heavy," the Pennsylvania Supreme Court was merely recognizing the difficulty of prevailing on an ineffective assistance of counsel claim. To accept the contrary argument is to disobey "§ 2254(d)'s highly deferential standard for evaluating state-court rulings, which demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (internal citations and quotation marks omitted). Such "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law," *id.*, and we accordingly reject it.

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The mitigation evidence elicited by Williams on collateral review is no doubt sympathetic. It portrays a much more complicated and troubled individual than the one depicted during the trial's penalty phase. But the evidence is not unequivocally mitigating. Some of the evidence is even contradictory. Had Williams offered Drs. Kessel, Fleming, and Kaufman at the penalty phase, the Commonwealth could have countered with an abundance of evidence suggesting that Williams was not mentally ill and that he did not suffer psychological impairment. After all, Williams was examined by at least three professionals in and around the time of Norwood's murder; not one thought him seriously mentally impaired. Dr. Zanni stated that Williams' "[i]nsight and judgment are not impaired"; Dr. Heller reported that Williams "show[ed] no evidence of mental impairment" and was "[w]ithout psychosis." According to Dr. Camiel, Williams' symptoms of psychosis were recent and they appeared after Norwood was murdered and Williams was incarcerated. Not one of these doctors thought Williams was suffering from psychosis on or around the time of the offense; indeed, the record is devoid of contemporaneous evidence of psychological impairment. This final point is critical, for it distinguishes the instant matter from decisions such *Thomas v. Horn*, 570 F.3d 105 (3d Cir. 2009), where evidence that the petitioner was mentally ill at the time of the offense was clear and undisputed. *See id.* at 126 (stating that "the Commonwealth does not dispute that even the most cursory search would have yielded evidence of Thomas' long history of mental illness").

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The conflicting nature of the mental health testimony is, in fact, reminiscent of our recent decision in *Lewis v. Horn*, 581 F.3d 92 (3d Cir. 2009). There, we found that evidence purporting to show that petitioner was mentally ill and brain damaged was "in large part contradictory." *Id.* at 112. Evaluations conducted contemporaneous to petitioner's crime revealed a mentally competent young man, while those performed in anticipation of the PCRA proceeding portrayed an individual riddled with psychological difficulty. *Id.* at 112-13. The contradictory nature of the evidence undercut the effectiveness of Lewis' mitigation testimony, and precluded us from overturning the state courts' determination that Lewis was mentally competent at the time of the offense. Williams' mental health evidence is similarly undercut in the instant matter.

Furthermore, even the testimony offered by Williams' mental health experts was not uniformly sympathetic. Drs. Kessel and Fleming spoke of Williams' inner "rage," especially with respect to "males who behaved sexually toward him." Dr. Fleming explained that Williams suppressed this rage "until it exploded." She described him as extremely impulsive, and opined that Williams gave "less consideration to the consequences of his actions than a normal person would." Dr. Kaufman echoed this sentiment, testifying that Williams redirected his inner pain onto others "without regard to the consequences." Such evidence is not necessarily mitigating, even if all three doctors rationalized this conduct by linking it to Williams' post-traumatic stress disorder. Their explanation was obviously insufficient for the Pennsylvania Supreme Court, which found that the mitigating evidence offered

by Drs. Kessel, Fleming, and Kaufman was neutralized by Williams' predilection to "direct[] his hurt onto other people and . . . to respond to stressful situations in a manner without regard to the consequences." *Williams II*, 863 A.2d at 520 (quoting PCRA decision and adopting its findings). The Court therefore rejected the collective opinion that Williams was acting under extreme mental disturbance at the time of the offense and that his capacity to appreciate the criminality of his conduct or to conform it to the requirements of the law was substantially impaired. Given the conflicting evidence of psychological damage, we cannot say that this finding was an unreasonable determination of facts under § 2254(d)(2).

The testimony concerning Williams' home life is also in tension with itself. On the one hand, several witnesses appeared at the PCRA hearing to describe years of physical beatings and sexual molestation. Their narrative was one of serious, long-term abuse. On the other hand, ten to fifteen witnesses took the stand at Williams' certification proceeding and provided a much different characterization. According to this account, provided six months prior to the Norwood murder, Williams' family and friends were loving, supportive, stable, and certainly not abusive. Some of this anti-mitigation evidence was offered by the very witnesses who later described Williams' home life in a negative light. Williams himself described his upbringing in positive terms. He told Dr. Heller (three months before he murdered Norwood) that "his family relationships are close and meaningful." He never acknowledged any physical or sexual abuse in or around the time of the murder. Williams' only statements to the

contrary were elicited ten years after his conviction, in preparation for PCRA review. The contradictory nature of the abuse testimony seriously dilutes its mitigating effect.[31] *See Lewis*, 581 F.3d at 112-13 (remarking that petitioner never acknowledged physical abuse and suggesting that his failure to do so was anti-mitigation evidence).

In addition to the evidence set forth above, we cannot lose sight of the aggravating factors present in this case, which were significant and afforded considerable weight by the state court. The Pennsylvania Supreme Court highlighted the manner in which Williams "planned and

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31. Williams suggests that we should overlook the contradictory nature of the abuse testimony. In support of this assertion, he cites to our recent decision in *Bond v. Beard*, 539 F.3d 256 (3d Cir. 2008). His citation is inapposite. In *Bond*, the petitioner offered evidence during the PCRA proceeding that depicted "an extremely troubled and deprived childhood." *Id.* at 280. Such evidence differed significantly from that offered at the petitioner's trial, where there was general testimony of childhood difficulty but not of anywhere near the magnitude described during postconviction proceedings. *See id.* at 279-81. We found that the mitigation evidence offered during collateral review was highly persuasive and its omission from trial was prejudicial. In *Bond*, however, we explained that the evidence of childhood abuse and neglect "would not contradict earlier testimony, but rather provide details not uncovered by trial counsel at the penalty phase hearing." *Id.* at 291. This is not the case in the present matter; the testimony of Williams' childhood abuse contradicts that set forth at the certification hearing and provided by his mother at the trial's penalty phase. As such, the mitigating effect of the evidence is seriously undercut.

carried out the killing, as well as his subsequent attempts to cover up the murder by burning the body." *Williams II*, 863 A.2d at 520. On top of this, Williams "had a significant history of violent felony convictions," *id.* at 521 n.12; "this was not his first murder," *id.* For the Pennsylvania Supreme Court, the brutal facts of the murder, combined with Williams' criminal history, strongly counseled against a finding of prejudice.

In *Woodford v. Visciotti*, 537 U.S. 19, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002), the United States Supreme Court considered a petition that was in some respects similar to that presented in the instant matter. Visciotti shot and murdered one victim and seriously maimed a second before he was arrested and later convicted of first degree murder. On collateral review in the state courts, Visciotti argued that he received ineffective assistance of counsel during the trial's penalty phase because his attorney failed to present evidence that Visciotti grew up in a "dysfunctional family in which he suffered continual psychological abuse." *Id.* at 26 (internal quotations omitted). This troubled past, in turn, purportedly led to myriad psychological difficulties in Visciotti's adult life. *Id.* The state supreme court rejected Visciotti's petition, concluding that

> the circumstances of the crime (a cold-blooded execution-style killing of one victim and attempted execution-style killing of another, both during the course of a preplanned armed robbery) coupled with the aggravating evidence of prior offenses (the knifing of one man, and

> the stabbing of a pregnant woman as she lay in bed trying to protect her unborn baby) was devastating.

Id. (describing state supreme court decision). These aggravating factors were so severe, the state supreme court concluded, that they completely overwhelmed the evidence proffered in mitigation. Therefore, trial counsel's failure to present the mitigating evidence in the first instance was not prejudicial. *Id.* On federal habeas review, the Ninth Circuit granted the writ, but the Supreme Court reversed. According to the Supreme Court, AEDPA endows the state courts with primary responsibility for weighing aggravating and mitigating factors in a prejudice inquiry. *Id.* at 27. Furthermore, it was not objectively unreasonable for the state supreme court to attribute significant weight to the aggravating circumstances in a situation such as this--the crime was particularly heinous and, more importantly, Visciotti had a pronounced history of violent felony convictions. By downplaying the weight of the aggravating factors, the Ninth Circuit had inappropriately substituted its own judgment for that of the state supreme court. *Id.* at 26-27. *Woodford* makes clear that such second-guessing is unwarranted on federal habeas review.

Woodford's reasoning is particularly apt here. The Pennsylvania Supreme Court found that Williams' brutal crimes and record of violent convictions overwhelmed the evidence proffered in mitigation. The Court took especial note that "this was not [Williams'] first murder conviction," *Williams II*, 863 A.2d at 521 n.12, and it

specifically adopted the reasoning of the PCRA court, which found that the aggravating evidence "outweighed" the mitigating testimony offered by Williams' mental health experts, *see id.* at 520. In other words, the state supreme court concluded that given the nature of the aggravating circumstances, Williams could not meet "his burden of demonstrating there was a reasonable probability [that] the presentation of [mitigating] evidence would have resulted in a life sentence instead of the death penalty." *Id.* at 521 n.12. In light of the totality of the reconstituted record--the nature of the offense and Williams' history as a convicted murderer, as well as the equivocal nature of the mitigation evidence--we cannot say that this determination was unreasonable.

The Pennsylvania Supreme Court's decision is further bolstered by the fact that the jury did not find Williams' youth to be a circumstance that mitigated the severity of the offense. If ever a capital defendant qualified for the mitigating circumstance set forth in 42 Pa. Cons. Stat. § 9711(e)(4), Terrance Williams did. He was four months past his eighteenth birthday. According to Williams' brief, he is one of the youngest men ever placed on Pennsylvania's death row. Williams' trial counsel built his closing argument around his client's youth and begged the jury to find that age was a mitigating factor. But to no avail. The jury's rejection of this mitigation argument is telling; it strongly suggests that the jurors' collective evaluation of Williams' character would have led them to reject other, less clear-cut mitigating evidence. *See, e.g.*, *Wiggins*, 539 U.S. at 535 (indicating that characteristics which reflect the defendant's "moral culpability" are

relevant at the penalty phase); *see also Jermyn*, 266 F.3d at 310 (explaining that at the penalty phase, jury appraises defendant's "moral culpability"). This is but another factor that points away from a finding of prejudice.

In sum, the Pennsylvania Supreme Court found that Williams was not prejudiced by Panarella's failure to present the mitigating evidence set forth in postconviction proceedings. This determination was not an unreasonable application of *Strickland*. In reaching our conclusion, we are mindful of the Supreme Court's recent admonition that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington*, U.S. , 131 S. Ct. at 786. That "'fairminded jurists could disagree' on the correctness of the state court's decision," is, by itself, a sufficient basis for rejecting federal habeas relief. *Id.* (quoting *Yarborough*, 541 U.S. at 664). The reconstituted record consists of conflicting mental health evaluations, contradictory depictions of Williams' home life, and unequivocal evidence regarding the brutality of the crime and Williams' history of violent offense conduct. *Strickland* was not unreasonably applied on this record. Habeas relief is therefore unwarranted.

IV

In 1986, a Pennsylvania jury convicted Terrance Williams of first degree murder and recommended a sentence of death. Williams' conviction was upheld by the state courts on direct appeal, and his attempts to obtain collateral relief were likewise unavailing. On federal habeas review, the District Court denied Williams'

petition for relief. Today we affirm that judgment for the reasons set forth above. In so doing, we are mindful of the gravity of our decision. We are bound, however, to respect the lawful decisions of the state courts. Thus, twenty-five years after the jury returned its verdict, we deny Williams' request for habeas relief.

APPENDIX Q — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, DATED JANUARY 22, 2009

SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

TERRANCE WILLIAMS,

Appellant.

Submitted September 30, 2008
January 22, 2009

Appeal No. 560 CAP from the Order entered on 11/28/2007 in the Court of Common Pleas, Criminal Division of Philadelphia County dismissing the PCRA petition at No. CP-51-CR-0823621-1984, Keogh, J.

BEFORE: CASTILLE, C.J., and SAYLOR, EAKIN, BAER, TODD, McCAFFERY and GREENSPAN, JJ.

ORDER

PER CURIAM

AND NOW, this 22nd day of January, 2009, the order of the PCRA court is hereby **AFFIRMED**. *See Commonwealth v. Marshall*, 596 Pa. 587, 947 A.2d 714 (2008).

APPENDIX R — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, DATED SEPTEMBER 27, 2006

SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

TERRANCE WILLIAMS,

Appellant.

Submitted August 2, 2006
September 27, 2006

Appeal No. 476 CAP from the Order entered on 5/4/05 in the Court of Common Pleas, Criminal Division of Philadelphia County dismissing PCRA relief at Nos. 2362-2367 August Term 1984.

ORDER

PER CURIAM

AND NOW, this 27th day of September, 2006, the order of the PCRA court is AFFIRMED.

APPENDIX S — OPINION OF THE SUPREME COURT OF PENNSYLVANIA, DATED DECEMBER 22, 2004

SUPREME COURT OF PENNSYLVANIA

No. 247 CAPITAL APPEAL DOCKET

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

TERRANCE WILLIAMS,

Appellant.

June 6, 2000, Submitted
December 22, 2004, Decided

BEFORE: CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN and BAER, JJ.

OPINION

Justice EAKIN.[1]

Terrance Williams appeals from the order denying his petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546.

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1. This case was reassigned to this author.

Appendix S

On June 11, 1984, appellant and Marc Draper lost their money gambling on a street corner. Appellant left to get money from the victim, Amos Norwood, and returned with $ 10. Later, Norwood drove up to the two. Appellant told Draper they were going to take some money from Norwood, and the three men left in Norwood's car. Appellant directed Norwood to a secluded area where he and Draper forced Norwood out of the car, bound and gagged him, and then took money and other items from him. Appellant, with a tire iron, and Draper, with a wrench, beat Norwood to death and fled. Later that night, appellant returned and burned the body.

On February 3, 1986, a jury convicted appellant of first degree murder, robbery, and conspiracy. After a penalty hearing, the jury found two aggravating circumstances: (1) appellant committed the killing while perpetrating a felony;[2] and (2) appellant had a significant history of felony convictions involving the use or threat of violence to the person.[3] The jury, after considering the mitigating evidence presented,[4] found no mitigating circumstances, and sentenced appellant to death. *See* 42 Pa.C.S. § 9711(c)(iv).

Newly assigned counsel filed post sentence motions, including claims of trial counsel's ineffectiveness. The motions were denied after a hearing; appellant filed a

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2. 42 Pa.C.S. § 9711(d)(6).

3. *Id.*, § 9711(d)(9).

4. Defense counsel presented mitigating evidence of appellant's age at the time of the crime, *id.*, § 9711(e)(4), and appellant's character and record, *id.*, § 9711(e)(8).

direct appeal to this Court, which affirmed the judgment of sentence. *Commonwealth v. Williams*, 524 Pa. 218, 570 A.2d 75 (Pa. 1990).

Appellant filed a *pro se* PCRA petition in 1995; new counsel was appointed and filed an amended petition in 1996. After hearings, argument, and a careful review of the record, the PCRA court denied appellant's petition. New counsel was appointed and this appeal followed.

Appellant raises 23 issues in his brief which have been reordered for ease of discussion:[5]

1. Was trial counsel ineffective for failing to investigate and present significant indicia of appellant's incompetency?

2. Did the Commonwealth use its peremptory strikes in a racially discriminatory manner, thus depriving appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 9, 13, & 26 of the Pennsylvania Constitution? Was appellant denied a full and fair opportunity to litigate his claim? Were all prior counsel ineffective for failing to litigate this claim?

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5. This Court is aware of the felt need to leave no stone unturned when counsel presents a capital appeal. However, we note that the quality of representation is not measured by the number of issues raised. It is not necessary to raise patently unavailing matters in order to ward off fears of a later finding of ineffectiveness; a good attorney will not disguise and thus weaken good points by camouflaging them in a flurry of makeweight issues which clearly have no merit.

3. Did the prosecutor use false evidence during the guilt phase of the trial? Were all prior counsel ineffective for failing to litigate this claim?

4. Did the prosecution fail to disclose portions of plea agreements with two prosecution witnesses? Were all prior counsel ineffective for failing to litigate this claim?

5. Did the trial court err when it failed to grant a motion for mistrial made after the Commonwealth failed to provide discovery concerning an identification of appellant by the victim's wife? Were all prior counsel ineffective for failing to litigate this claim?

6. Were references to cocaine and to appellant's incarceration contained in letters allegedly written by appellant improperly admitted at trial? Were all prior counsel ineffective for failing to litigate this claim?

7. Did the trial court err when it denied a mistrial motion based upon the Commonwealth's repeated efforts to present testimony concerning appellant's intent to deceive at the time he provided handwriting exemplars? Were all prior counsel ineffective for failing to litigate this claim?

8. Did the trial court err when it denied a motion for mistrial based upon the prosecutor's prejudicial statement made in front of the jury? Were all prior counsel ineffective for failing to litigate this claim?

9. Did the prosecutor make an improper and prejudicial reference to appellant's failure to call witnesses at trial?

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Were all prior counsel ineffective for failing to litigate this claim?

10. Were all prior counsel ineffective for failing to litigate the impropriety of the prosecutor's summation in which her personal opinion was expressed concerning the credibility of appellant's testimony?

11. Did the trial court's accomplice instructions, which implied appellant was involved in the commission of the offense when the defense asserted was alibi, violate appellant's right to due process? Were all prior counsel ineffective for failing to litigate this claim?

12. Was trial counsel ineffective at capital sentencing? Were prior counsel ineffective under the same standards for failing to litigate trial counsel's ineffectiveness?

13. Did the application of the "D6" aggravating circumstance to appellant, who the jury may have found guilty as an accomplice, violate the plain meaning of the death penalty statute, and result in the arbitrary and capricious imposition of a death sentence? Were all prior counsel ineffective for failing to litigate this claim?

14. Is Pennsylvania's "significant history" of violent felony convictions aggravating circumstance unconstitutionally vague on its face and as it was applied to appellant? Were all prior counsel ineffective for failing to litigate this claim?

15. Did the constitutional infirmities in appellant's prior conviction result in an arbitrary and capricious finding of

the "significant history" aggravating circumstance? Were all prior counsel ineffective for failing to litigate this claim?

16. Did the prosecutor knowingly use false evidence during the penalty phase? Were all prior counsel ineffective for failing to litigate this claim?

17. Did the prosecutor improperly inject her personal opinion regarding the propriety of the death penalty? Were all prior counsel ineffective for failing to litigate this claim?

18. Is appellant entitled to sentencing phase relief because the trial court's penalty phase jury instruction violated *Mills v. Maryland*? Were all prior counsel ineffective for failing to litigate this claim?

19. Did the trial court's failure to instruct the jury that "life imprisonment" means life without possibility of parole violate appellant's constitutional rights? Were all prior counsel ineffective for failing to litigate this claim?

20. Was appellant's death sentence a product of improper racial discrimination in violation of the Pennsylvania capital sentencing statute, the Pennsylvania Constitution, and the United States Constitution? Were all prior counsel ineffective for failing to litigate this claim?

21. Did the "proportionality review" performed by this Court violate due process and deny appellant meaningful appellate review? Were all prior counsel ineffective for failing to litigate this claim?

22. Were all prior counsel ineffective for failing to litigate the claims raised in this appeal?

23. Is appellant entitled to relief from his conviction and sentence because of the cumulative effect of the errors described herein?

To be entitled to relief under the PCRA, appellant must show, as to each claim, that the allegation of error has not been previously litigated or waived, 42 Pa.C.S. § 9543(a)(3), and that "the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel." *Id.*, § 9543(a)(4). An issue is previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue...." *Id.*, § 9544(a)(2).[6]

Appellant's claim that the trial court's penalty phase jury instruction violated *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988), has been previously litigated on direct appeal. *Mills* requires a death sentence be vacated if there is a substantial probability the trial court's jury instruction could have led reasonable jurors to conclude they could only consider those mitigating factors which they unanimously found

6. Issues 3, 4, 5, 6 and 17 were raised in post trial motions and decided adversely to appellant. However, since the highest court in which appellant was entitled to review as a matter of right has not ruled on the merits of these issues, they are not previously litigated. *See* 42 Pa.C.S. § 9544(a)(2).

to exist. *Id.*, at 384. On direct appeal, this Court relied on *Commonwealth v. Frey*, 520 Pa. 338, 554 A.2d 27 (Pa. 1989), which held where jury instructions stated a unanimous verdict is necessary to impose a death sentence, no further instruction is required regarding the fact that mitigating factors need not be found unanimously, since Pennsylvania's death penalty statute does not require unanimity in establishing mitigating circumstances. *Williams*, at 82. Accordingly, we rejected appellant's *Mills* claim, and he is not entitled to revive it under the PCRA.[7] *See Commonwealth v. Bracey*, 568 Pa. 264, 795 A.2d 935, 939 n.2 (Pa. 2001) (appellant cannot obtain post conviction relief of claims previously litigated on direct appeal by alleging ineffectiveness of prior counsel and presenting new theories of relief).

Appellant's claim that the aggravating factor in § 9711(d)(6) (killing committed during perpetration of felony) was improperly applied to him because he was an accomplice has also been previously litigated. On direct appeal, this Court addressed appellant's argument that this aggravating circumstance did not apply to him "because there was no proof presented that appellant, rather than his co-brutalizer, Draper, landed the fatal blow." *Williams*, at 83. This Court concluded: "This argument, when raised in the context of the penalty stage,

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7. Furthermore, the United States Supreme Court recently held *Mills* does not apply retroactively. *See Beard v. Banks*, 542 U.S. 406, 159 L. Ed. 2d 494, 124 S. Ct. 2504 (2004). Since appellant's trial occurred in 1986, two years prior to *Mills*, the rule in *Mills* does not apply to his case.

does not even reach the level of speciousness; it is simply ludicrous." *Id.* We will not address the same claim, cloaked in a different theory of relief, in the collateral setting.[8]

All except two of appellant's remaining issues assert trial counsel's ineffectiveness during the guilt and penalty phases, as well as appellate counsel's ineffectiveness for failing to raise these issues on direct appeal. Any alleged error during the guilt and penalty phases has been waived because of trial counsel's failure to raise it; however, appellant may still obtain relief for trial counsel's ineffectiveness if he is able to demonstrate appellate counsel was ineffective for failing to pursue the claims. *See Commonwealth v. Rush*, 576 Pa. 3, 838 A.2d 651, 656 (Pa. 2003) (citing *Commonwealth v. McGill*, 574 Pa. 574, 832 A.2d 1014, 1022 (Pa. 2003) (when court is faced with "layered" ineffectiveness claim, only viable ineffectiveness

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8. Appellant contends *Commonwealth v. Lassiter*, 554 Pa. 586, 722 A.2d 657 (Pa. 1998) (plurality), mandates reversal of his death sentence. *Lassiter* held "[§] 9711(d)(6) may not be applied to an accomplice who does not 'commit' the killing in the sense of bringing it to completion or finishing it." *Id.*, at 662. However, aside from the fact *Lassiter* was decided after appellant's judgment of sentence became final, the jury also found appellant had a significant history of violent felony convictions. Thus, another aggravating circumstance, § 9711(d)(9), existed, and no mitigating circumstances were found; the penalty would still have been death. *See Commonwealth v. Christy*, 511 Pa. 490, 515 A.2d 832, 842 (Pa. 1986) (since jury found one aggravating circumstance and no mitigating circumstances, death sentence upheld even though another aggravating circumstance is held invalid) (citing *Commonwealth v. Beasley*, 504 Pa. 485, 475 A.2d 730, 738 (Pa. 1984)); *see also* 42 Pa.C.S. § 9711(c)(1)(iv).

claim is that related to most recent counsel, appellate counsel)).

We set forth the standard for preserving such "layered" ineffectiveness claims in *McGill* and *Rush*:

> In order to preserve a claim of ineffectiveness, a petitioner must "*plead*, in his PCRA petition," that appellate counsel was ineffective for failing to raise all prior counsel's ineffectiveness. Additionally, a petitioner must "*present* argument on, i.e. develop each prong of the *Pierce* test" as to appellate counsel's deficient representation. "Then, and only then, has the petitioner preserved a layered claim of ineffectiveness for the court to review; then, and only then, can the court proceed to determine whether the petitioner has proved his layered claim."

Rush, at 656 (citations and footnote omitted); *see also McGill*, at 1021-23.

The "*Pierce* test" requires appellant to prove, with respect to appellate counsel's performance, that: (1) the underlying claim of trial counsel's ineffectiveness has arguable merit;[9] (2) appellate counsel had no reasonable

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9. An assessment of this prong requires appellant to establish each *Pierce* prong with respect to trial counsel's performance; failure to establish any one of the prongs concerning trial counsel will defeat the entire claim. *Commonwealth v. Basemore*, 560 Pa. 258, 744 A.2d 717, 738 n.23 (Pa. 2000) (citing *Commonwealth v.*

basis for failing to pursue the claim; and (3) but for appellate counsel's ineffectiveness, the result on direct appeal would have differed. *See McGill*, at 1022-23. This "performance and prejudice" test was first enunciated in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), and was recognized in *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (Pa. 1987), as the proper test under the Pennsylvania Constitution. Failure to satisfy any prong of the test will defeat an ineffectiveness claim. *Basemore*, at 738 n.23 (citing *Rollins*, at 441) (ordinarily, post conviction claim of ineffective assistance of counsel may be denied by showing petitioner's evidence fails to meet single one of three prongs for claim).

Appellant has met the pleading requirement with respect to his remaining issues, as he alleges the ineffectiveness of both trial and appellate counsel. In his statement of questions presented, appellant inserts boilerplate ineffectiveness claims into many of his issues, asserting all prior counsel were ineffective for failing to litigate the issue. Appellant also includes a general boilerplate assertion of "all prior counsel's" ineffectiveness as a separate issue. He presents argument concerning his underlying claims of trial counsel's ineffectiveness, thus satisfying the first prong of *Pierce* with respect to appellate counsel. However, he fails to develop the remaining two prongs concerning appellate counsel's

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Rollins, 558 Pa. 532, 738 A.2d 435, 441 (Pa. 1999)). This "merit" prong has been referred to as containing a "nested" argument—trial counsel's performance must be addressed in order to determine whether appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness. *See Rush*, at 656.

stewardship; thus, he has failed to preserve his claims of appellate counsel's ineffectiveness as required by *McGill*.

Where the appellant has established the arguable merit of his underlying claim of trial counsel's ineffectiveness, remand may be warranted for the opportunity to correct his deficient pleading of the remaining two prongs regarding appellate counsel's ineffectiveness. *Rush*, at 657.

> Nevertheless, there is simply no need to remand a PCRA petition when the petitioner has not carried his *Pierce* burden in relation to the underlying claim of trial counsel's ineffectiveness, since even if the petitioner were able to craft a perfectly layered argument in support of his claim, the petitioner's claim would not entitle him to relief.

Id., at 657-58. Thus, we need not remand if appellant has not met his burden of proving his underlying claims of trial counsel's ineffectiveness.

As discussed below, appellant has not demonstrated his entitlement to relief on any of these underlying claims. Since all of appellant's underlying claims of trial counsel's ineffectiveness fail, his claims of appellate counsel's ineffectiveness are necessarily defeated as well. *McGill*, at 1023. Therefore, we need not remand in order for him to develop the remaining two prongs of *Pierce* with respect to appellate counsel. *See Rush*, at 657-58; *McGill*, at 1025.

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Appellant first claims trial counsel was ineffective for failing to raise the issue of his competency to stand trial. Although no separate competency hearing was held, the issue was addressed at appellant's PCRA hearing, in conjunction with his claim that counsel should have presented psychiatric mitigating evidence. The PCRA court reviewed the following evidence: a 1985 presentence psychiatric evaluation, for an unrelated offense, conducted 10 months prior to trial for the instant offense, which stated appellant was competent to proceed to sentencing; a defense expert's testimony that there was not enough information in the presentence report to determine competency, but appellant "may have been" impaired in his ability to assist counsel; another defense expert's testimony that appellant was not chronically psychotic, but that his ability to talk with his attorney about his past was impaired by his post traumatic stress disorder; two defense experts' testimony that appellant suffered no substantial organic impairment; defense counsel's testimony that although appellant had the opportunity to enter a plea bargain and receive a life sentence, appellant insisted he was not guilty and wanted to go to trial; and the entire trial record.

The PCRA court weighed all the evidence before it and concluded the pre-sentence evaluation was most relevant, as it was conducted closest in time to appellant's trial; the current opinions of the defense experts concerning appellant's mental state at trial 12 years ago were, appropriately, afforded less weight. Furthermore, these experts had been retained for the purpose of evaluating appellant's claim that trial counsel

should have presented psychiatric mitigating evidence, not to evaluate appellant's competency to stand trial. Most significantly, the testimony of defense counsel and the trial record revealed that while appellant may have been troubled at the time of his trial, he was not suffering from any mental impairment which would have rendered him unable to understand or participate in the proceedings. *See* 50 P.S. § 7402(a) (person is incompetent to stand trial when he is substantially unable to understand nature or object of proceedings against him or to participate in his own defense). We perceive no abuse of the PCRA court's discretion in making this determination; accordingly, appellant is not entitled relief.

Appellant next claims the prosecutor exercised her peremptory challenges in a racially discriminatory manner, in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986). Appellant also claims he should have been permitted to view the prosecutor's notes from voir dire, in order to establish his claim of purposeful discrimination. Appellant's claim is a derivative one, raised in the context of ineffective assistance, since trial counsel did not raise a *Batson* objection during voir dire. In *Commonwealth v. Uderra*, 580 Pa. 492, 862 A.2d 74, 2004 Pa. LEXIS 2499 (October 21, 2004), this Court held, "[I]n order to succeed on an unpreserved claim of racial discrimination in jury selection,...a post-conviction petitioner may not rely on a prima facie case under *Batson*, but must prove actual, purposeful discrimination by a preponderance of the evidence,...in addition to all other requirements essential to overcome the waiver of the underlying claim." 862 A.2d at ___, 2004 Pa. LEXIS 2499 at *28-29 (citation omitted).

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Beyond baldly asserting the prosecutor used 14 of 16 peremptory strikes against African-American jurors, appellant has not made the requisite showing. He provides *no information* concerning the race of the jurors who were acceptable to the Commonwealth but stricken by the defense, nor does he provide the racial composition of the final jury. However, the PCRA court noted its own records reflected that, of a possible 20 peremptory challenges, 14 were used against African-Americans, two were used against Caucasians, and four were unused. Furthermore, out of 111 venire persons, 43 were African-American, and the final composition of the jury was five African-Americans and seven Caucasians. Based on these facts, the PCRA court properly concluded appellant had failed to establish he was entitled relief.[10]

Appellant's next claim focuses on the prosecutor's impeachment of defense witness Portie Robinson, who testified on direct examination that his fellow inmate, Marc Draper, had told him someone other than appellant

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10. Appellant asserts the prosecutor's notes were essential to him at the PCRA hearing, because the prosecutor referred to them during her testimony and used them to prepare her testimony, and because they were relevant to the issue of whether she exercised racial bias in selecting the jury. However, the PCRA court permitted appellant to inspect a summary of the prosecutor's notes, from which she testified; appellant does not explain why the summary was an insufficient aid in his cross-examination of the prosecutor, and fails to demonstrate exceptional circumstances existed which required production of the actual notes. 42 Pa.C.S. § 9545(d)(2) ("No discovery, at any stage of proceedings under this subchapter, shall be permitted except upon leave of court with a showing of exceptional circumstances.").

committed the murder with him. To establish Robinson's bias against Draper, the prosecutor attempted to show Draper's father, a police officer, had participated in an investigation which led to Robinson's convictions. When Robinson denied this, the prosecutor presented the rebuttal testimony of the prosecutor from Robinson's trial, who stated he had provided Robinson's attorney with the name of Draper's father.

Appellant contends this rebuttal testimony was false; he argues Draper's father was never listed as a Commonwealth witness. However, the record belies appellant's argument; Draper's father was never called as a witness, so his name was not on the Commonwealth's witness list, but rather was given to defense counsel during an informal conversation, identifying him as one of the investigating officers. N.T. Trial, 1/31/86, at 1522-24. Accordingly, appellant's claim is meritless.

Appellant next claims the prosecutor failed to disclose to appellant, or to the jury, the full terms of co-defendant Marc Draper's plea agreement and the complete criminal history of Commonwealth witness Renee Rucker. Draper received a life sentence in exchange for pleading guilty to second degree murder and agreeing to testify against appellant. Appellant contends there were other charges against Draper arising from a previous robbery he had committed with appellant which the Commonwealth agreed to *nolle pros* in exchange for his testimony. This contention is meritless; other than his own assertion, appellant provides no support for this allegation. The record reveals Draper's full plea agreement was read

into the trial record, and Draper acknowledged it was the full extent of his agreement. N.T. Trial, 1/22/86, at 661-63. Appellant's uncorroborated allegation does not entitle him to relief.

Appellant contends Renee Rucker was not cross-examined concerning her prior *crimen falsi* convictions under a different name. Appellant points to the fact there were two listings for "Renee Rucker" in Philadelphia County's data base, and one listing also had an alias and included four theft convictions. However, appellant acknowledges these two listings have different photo identification numbers, and he fails to show they are actually the same person. Thus, appellant's claim fails.

Appellant's next issue focuses on his identification by the victim's wife, Mamie Norwood. At trial, Mrs. Norwood testified she had seen appellant on her front porch the night of the murder. Appellant contends that, prior to trial, there was no indication this witness could identify him; however, during trial preparation, the prosecutor was informed the witness recognized appellant as the man on her porch, after seeing his picture in the newspapers three or four weeks before trial and then seeing him at the preliminary hearing. Appellant argues the trial court should have granted a mistrial because the defense was not notified of the witness's ability to identify appellant, and was thereby deprived of the opportunity to file a suppression motion.

"A defendant seeking relief from [a] discovery violation must demonstrate prejudice in order to be entitled to a

new trial." *Commonwealth v. Jones*, 542 Pa. 464, 668 A.2d 491, 512 (Pa. 1995) (citation omitted). It appears from the sidebar discussion concerning this issue that the witness's ability to identify appellant was not known to the Commonwealth until one month before trial, when Mrs. Norwood mentioned the photos in the paper while being interviewed by the prosecutor in preparation for trial. *See* N.T. Trial, 1/14/86, at 191-94. The witness's trial testimony reveals she was never asked to identify the man on her porch, and she did not come forward with her recognition of appellant's newspaper photo until after the preliminary hearing. *Id.*, at 129-30. There is no indication this information was deliberately withheld by the Commonwealth, nor has appellant demonstrated he was prejudiced by not being able to move for suppression of this testimony. Nothing in the record warrants the conclusion this identification was obtained by suggestive means or by any other means in violation of appellant's constitutional rights; therefore, a motion to suppress would have been futile. Finally, trial counsel vigorously cross-examined Mrs. Norwood concerning the conditions under which she saw the man on her porch, her initial inability to identify him, and her subsequent identification of appellant as that person. *See id.*, at 117-132, 141-46. Accordingly, appellant has not demonstrated he is entitled to relief.

Appellant's next two issues focus on letters he allegedly wrote to Marc Draper while in prison, in an effort to convince Draper to lie at trial. Appellant argues these letters were improperly admitted into evidence at trial because they contained prejudicial references to drug activity and to appellant's incarceration. He further

argues the trial court should have granted a mistrial based upon the prosecutor's questions to the handwriting expert who identified the letters as having been written by appellant.

With respect to appellant's argument that the letters contained prejudicial references to prior bad acts, it was made clear to the jury that the references to drug activity were merely part of the "story" concocted by appellant in order to disassociate himself from the murder; Marc Draper testified this story was clearly fiction. N.T. Trial, 1/22/86, at 732, 739, 748. Appellant's prison number and address were not redacted from the letters, but the trial court ruled there was no prejudice to appellant by leaving this information on the letters, since "the testimony clearly indicates that the [appellant] was in prison at the time; the inference being that he was awaiting trial on this case...." *Id.*, at 756-57. Appellant's argument that the address revealed he was in state prison instead of county jail, and thus was serving time for a prior murder, is baseless. There was no evidence presented concerning appellant's prior conviction, and the address on the letters did not name the correctional facility or indicate it was a state prison; therefore, appellant's contention that the jury drew this inference is meritless.

Appellant argues the prosecutor's questions to the handwriting expert prejudiced him by suggesting he had tried to disguise his handwriting when he provided samples to the expert. The prosecutor's questions were asked in response to the expert's description of how he is able to detect attempts to alter or disguise one's handwriting;

when the prosecutor asked if the expert could ascertain whether appellant had attempted to disguise his writing, defense counsel objected and the trial court sustained the objection. The expert never answered the prosecutor's questions, and the jury was later instructed counsel's questions do not constitute evidence. N.T. Trial, 2/3/86, at 1790. *See Commonwealth v. LaCava*, 542 Pa. 160, 666 A.2d 221, 231 (Pa. 1995) (it is well established that attorney's questions and statements are not evidence; juries are presumed to follow trial court's instructions). Accordingly, we perceive no prejudice to appellant.

Appellant's next three issues challenge the propriety of statements made by the prosecutor during the guilt phase. Appellant is entitled to a new trial on the basis of prosecutorial misconduct only where the unavoidable effect of the prosecutor's comments was to prejudice the jurors, forming in their minds a fixed bias and hostility toward appellant, such that they were incapable of weighing the evidence objectively and rendering a true verdict. *Id.*, at 231. The prosecutor's comments cannot be viewed in isolation, but must be considered in the context in which they were made. *Commonwealth v. Carpenter*, 533 Pa. 40, 617 A.2d 1263, 1267 (Pa. 1992).

On redirect examination of appellant, defense counsel asked whether he was eligible to return to college that fall, and if he had been planning to return. The prosecutor, knowing this line of questioning would open the door to character evidence, which would permit her to rebut this testimony with evidence of appellant's prior convictions, stated, "Objection, your honor. You know, if we may see you

at sidebar, I think counsel is opening up an area that he, indeed, will regret." N.T. Trial, 1/30/86, at 1392. Appellant argues this remark prejudiced him because the jurors could have inferred there was other damaging evidence against him which they were not allowed to consider. The trial court, however, after overruling the prosecutor's objection and admonishing her not to "characterize anything about what the defense is doing," *id.*, immediately reminded the jurors the remarks of counsel were not evidence and instructed them to disregard the remark. *Id.*, at 1397. Since the jury is presumed to have followed the trial court's instructions, *LaCava*, at 231, appellant has not demonstrated counsel's remark prejudiced him.

Appellant next claims the prosecutor impermissibly commented on his failure to call certain witnesses. During closing, the prosecutor stated:

> Now, ladies and gentlemen, this case is not a case of [trial counsel] against the Commonwealth. Bear in mind that the defendant's resources do not rely exclusively on his attorney. *The defendant's case is the defendant's case, and whatever the defendant has or knows about this event, and if it were truthful, he has his opportunity, through his attorney, to bring in witnesses, to subpoena witnesses*, to do what needs to be done on cross examination to bring out that truth.

N.T. Trial, 2/3/86, at 1660-61 (emphasis added).

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A prosecutor may respond to defense arguments and is free to present her case with logical force and vigor. *Commonwealth v. Koehler*, 558 Pa. 334, 737 A.2d 225, 240 (Pa. 1999). The prosecutor's statements, viewed in the context in which they were made, were proper response to defense counsel's assertion in his closing argument that the defense does not have the "tremendous resources" the prosecution does:

> Generally, I would come before you and say what Terrence Williams has in his defense is [trial counsel]. The Commonwealth, as is their burden, has a tremendous amount of resources that they have available to it in order to build that case. Terrence Williams does not have access. I do not have access to those resources....

Id., at 1627-28. The prosecutor's comments were fair response, and appellant's claim fails.

Appellant next claims the prosecutor, during closing, impermissibly expressed her personal opinion concerning the credibility of his testimony:

> Mar[c] Draper's deal, as it were, is not one of the happiest moments of a prosecutor. Prosecutors don't, generally speaking, like to make deals with murderers; however, I think that a distinction can be made between two persons who commit the same atrocious act, one of whom does everything he can, after committing the act, to right his wrong. Obviously, he can't

> bring the victim back to life but he can do what is necessary to bring all responsible to justice in this case. Compare that with a person who commits atrocious, murderous, malicious acts and then spends the rest of his days lying, covering up, suborning perjury, trying to make things seem as they're not. *I think a distinction can be made in such a case.*

Id., at 1695 (emphasis added). Viewed in context, these statements were not an opinion concerning appellant's credibility; the prosecutor was contrasting the evidence of the Commonwealth's witness, Marc Draper, with that of appellant. Throughout trial, and during closing argument, defense counsel had attacked Draper's credibility; therefore, the prosecutor's comments were fair response. *See Commonwealth v. Miller*, 572 Pa. 623, 819 A.2d 504, 516 (Pa. 2002) (as long as prosecutor does not assert personal opinions, she may comment on witness's credibility, especially when witness's credibility has previously been attacked by defense). Further, the prosecutor was summarizing appellant's actions after the murder; evidence of appellant's attempts to escape responsibility had been presented at trial. The prosecutor's use of the phrase "I think," viewed in context, does not transform her comparison of appellant and Draper into personal opinion. Therefore, appellant's argument is baseless.

Finally, regarding the guilt phase, appellant claims the jury instruction regarding Draper's liability as an accomplice violated appellant's due process rights because

it did not incorporate appellant's alibi defense, thus implying he had admitted complicity in the murder. In reviewing an allegation of an incorrect jury instruction, the charge must be viewed as a whole. *Commonwealth v. Saranchak*, 544 Pa. 158, 675 A.2d 268, 276 (Pa. 1996). Jury instructions will be upheld if they adequately and accurately reflect the law and are sufficient to guide the jury properly in its deliberations. *Commonwealth v. Thompson*, 543 Pa. 634, 674 A.2d 217, 219 (Pa. 1996). Here, the trial court instructed the jury:

> [W]hen a Commonwealth witness was so involved in the crime charged that he was an accomplice, his testimony has to be judged by certain precautionary rules.
>
> * * *
>
> In view of the evidence of Marc Draper's criminal involvement, you must regard him as an accomplice in the crimes charged and apply the special rules to his testimony. These are the special rules that apply in accomplice testimony: First, you should view the testimony of an accomplice with disfavor because it comes from a corrupt and polluted source....

N.T. Trial, 2/3/86, at 1773-74. Viewed in its entirety, the instruction adequately and accurately conveyed to the jury it should view Draper's testimony as coming from a corrupt source; it did not, as appellant contends, imply that because Draper was considered an accomplice, so was

appellant. Furthermore, the jury had just been instructed regarding appellant's alibi defense: "The defendant's evidence that he was not present, either by itself or together with other evidence, may be sufficient to raise a reasonable doubt of his guilt in your mind." *Id.*, at 1772. Accordingly, appellant's claim is meritless.

With respect to the penalty phase, appellant first argues trial counsel was ineffective for failing to investigate and present psychiatric mitigating evidence. Specifically, appellant contends counsel relied only upon appellant's unstable mother to suggest potential mitigation witnesses, and counsel never investigated appellant's records for mental health mitigation evidence. Appellant claims, had trial counsel properly investigated, he would have discovered numerous lay witnesses who would have testified concerning appellant's abusive upbringing and dysfunctional family history; he further claims counsel should have utilized the 1985 presentence psychiatric evaluation of Dr. Edwin Camiel, appellant's prison health records, and transcripts from appellant's previous murder trial. Based on these sources, appellant contends, trial counsel would have learned "appellant's adult mental illness (*e.g.*, his psychosis, anxiety, delusions, paranoia and schizophrenic condition) all resulted from his [post traumatic stress disorder], which itself resulted from his abusive upbringing." Appellant's Brief, at 29.

"[T]his Court has declined to find counsel ineffective for failing to proffer testimony from a mental health professional to establish a mitigating circumstance where there is no showing that such testimony...would have been

beneficial in terms of altering the outcome of the penalty phase hearing." *Commonwealth v. Howard*, 553 Pa. 266, 719 A.2d 233, 238 (Pa. 1998). Appellant has not met this heavy burden.

At the PCRA hearing, appellant presented three mental health experts who testified that, had they seen Dr. Camiel's 1985 evaluation, they would have conducted further investigation concerning appellant's mental health. It is unclear, however, what beneficial information concerning any mental impairment at the time of the murder would have surfaced, given the evaluation's statement that appellant "denied any past psychiatric history." Report of Edwin P. Camiel, M.D., 2/27/85, at 2. While acknowledging appellant's very apparent mental agitation and expressing a concern that appellant was developing a psychotic disorder necessitating treatment, the evaluation clearly notes, "this is the first evidence of psychiatric illness in this Defendant...." *Id.*, at 3. Thus, based on the information in the evaluation, appellant's alleged mental illness surfaced after his incarceration; the evaluation gives no indication of any mental impairment at the time of the murder. Accordingly, trial counsel was not ineffective for failing to rely on this report.

The three mental health experts also testified that, at the time of the murder, appellant was acting under extreme mental disturbance and his capacity to appreciate the criminality of his conduct or to conform it to the requirements of the law was substantially impaired. *See* N.T. PCRA Hearing, 4/8/98, at 106; 4/9/98, at 375, 425; 4/13/98, at 551, 560. However, the PCRA court, weighing

this testimony in context of the entire proceeding, along with the record evidence before it, concluded it was outweighed by testimony from these same experts that appellant "directed his hurt onto other people and that he was likely to respond to stressful situations in a manner without regard to the consequences." PCRA Court Opinion, 1/13/99, at 14. The PCRA court further noted the manner in which appellant planned and carried out the killing, as well as his subsequent attempts to cover up the murder by burning the body. *Id.*, at 15. Accordingly, we perceive no abuse of discretion by the PCRA court in weighing the evidence, and we will not disturb the court's determination. *See Commonwealth v. Abu-Jamal*, 553 Pa. 485, 720 A.2d 79, 93-94 (Pa. 1998) (this Court is bound by PCRA court's credibility determinations where there is record support for those determinations).

At the PCRA hearing, appellant also presented the testimony of several friends and family members concerning his abusive childhood, claiming counsel should have called these witnesses during the penalty phase. It does appear from the record of the penalty proceedings that the three mitigation witnesses counsel presented were not compelling;[11] however, counsel testified at the

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11. The witnesses were: appellant's mother, who testified concerning appellant's athletic accomplishments and only mentioned appellant's abusive upbringing briefly during cross-examination by the prosecutor; appellant's girlfriend, who testified appellant was a good father to their infant daughter and a sweet, honest person; and appellant's cousin, who gave a rambling narrative, peppered with Biblical references, about appellant being pressured by his teammates and getting into fights.

PCRA hearing it was his impression the mitigation witnesses utilized in appellant's first murder trial were not willing to cooperate as witnesses at this, his second. *See* N.T. PCRA Hearing, 4/17/98, at 767, 771-72. Counsel also testified, had he reviewed the presentence reports from appellant's prior trials, he would not have considered the issues of family dysfunction; rather, his tactic was to present appellant as a promising athlete, a well-liked and outgoing young man, for whom these charges were an extreme aberration. *Id.*, at 765. Counsel further testified that towards the end of the guilt phase, he became concerned because "I had asked Mr. Williams for cooperation that [sic] I wasn't getting it." *Id.*, at 791. Based upon this testimony, the PCRA court concluded appellant had not met his burden of demonstrating, had counsel presented such evidence during the penalty phase, there was a reasonable probability appellant would have received a life sentence. We will not disturb the PCRA court's credibility determination, and find no abuse of discretion by the court in this instance. Accordingly, appellant is not entitled relief on this claim.[12]

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12. In his reply brief, appellant points to *Williams v. Taylor*, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000), in which the United States Supreme Court found counsel ineffective for failing to conduct sufficient investigation of potential mitigating circumstances. Appellant contends counsel's preparation in that case was more extensive than that of appellant's counsel, and the high Court still found counsel's performance deficient and prejudicial. However, the mitigating evidence of the defendant's nightmarish childhood in *Williams* was significantly different than that in appellant's case; the neglect and abuse in *Williams* was so extensive as to require the parents' incarceration. Furthermore, as the PCRA court and this Court have concluded, appellant

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The next three issues concern the jury's finding appellant had a "significant history of violent felonies." 42 Pa.C.S. § 9711(d)(9). Appellant argues this aggravating circumstance is unconstitutionally vague on its face; he further contends the prior convictions on which it was based in his case were constitutionally infirm, and that the prosecutor presented false evidence concerning the facts of one of these convictions.

This Court has repeatedly rejected the argument that § 9711(d)(9) is unconstitutionally vague. *See Commonwealth v. Hill*, 542 Pa. 291, 666 A.2d 642 (Pa. 1995); *Commonwealth v. Rivers*, 537 Pa. 394, 644 A.2d 710 (Pa. 1994); *Commonwealth v. Fahy*, 512 Pa. 298, 516 A.2d 689 (Pa. 1986); *Commonwealth v. Goins*, 508 Pa. 270, 495 A.2d 527 (Pa. 1985); *Commonwealth v. Beasley*, 504 Pa. 485, 475 A.2d 730 (Pa. 1984). Appellant presents no compelling reason for us to overturn this line of cases.[13]

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has not met his burden of demonstrating there was reasonable probability the presentation of this evidence would have resulted in a life sentence instead of the death penalty. Appellant had a significant history of violent felony convictions; this was not his first murder conviction. Therefore, we reject appellant's attempt to analogize *Williams*. *See Commonwealth v. Williams*, 577 Pa. 473, 846 A.2d 105 (Pa. 2004) (mitigation evidence would not have had reasonable probability of changing outcome of proceedings, where records were replete with indications of appellant's violent and aggressive history).

13. Appellant attempts to distinguish *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976), on which this line of cases relied; he argues *Proffitt* involved a challenge to an allegedly vague *mitigating* circumstance. However, as this Court

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The prior convictions used to support this aggravating circumstance were appellant's 1982 conviction for robbery and burglary, and his 1984 murder conviction. Appellant now claims these convictions were obtained in violation of his constitutional rights, and recycles some of his arguments made on direct appeal of these convictions to the Superior Court. However, these convictions were affirmed on direct appeal, and have long since become final. *See, e.g., Commonwealth v. Williams*, No. 03247 Philadelphia 1996, unpublished memorandum (Pa. Super. filed November 12, 1997). Thus, appellant's claim fails.

Furthermore, there is no support for appellant's claim that the prosecutor introduced false testimony concerning the underlying circumstances of the 1982 robbery and burglary. Specifically, appellant claims testimony concerning his holding a rifle to the neck of one victim and firing it over the head of the other victim was false because his demurrer to the weapon possession charge in that case was sustained. However, the record belies appellant's claim; the Superior Court's opinion on direct appeal reveals appellant brandished the rifle and fired it to intimidate the victims. *Id.*, at 3. Accordingly, appellant's claim is baseless.[14]

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noted, *Proffitt* drew no such distinction: "a jury's evaluation of the *aggravating and mitigating* circumstances, as enumerated, requires no more line drawing than is commonly required of a factfinder in any law suit." *Beasley*, at 737 (citing *Proffitt*, at 257) (emphasis added).

14. Further, even if this aggravating circumstance was not applicable to appellant, the jury found another aggravating circumstance, § 9711(d)(6), existed, and no mitigating circumstances were found; the penalty would still have been death. *See* n.8, *supra*.

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Appellant next claims the prosecutor improperly injected her personal opinion regarding the propriety of the death penalty into her closing argument during the penalty phase: "He terrorized, he robbed, he blundered, and he killed, and he continued to kill, and I tell you, ladies and gentlemen, that *if the death penalty doesn't apply to Terrance Williams, I don't know who it would apply to.*" N.T. Trial, 2/3/86, at 1876 (emphasis added).

"During the sentencing phase of a capital case, a prosecutor must be afforded reasonable latitude in arguing [her] position to the jury and [she] may employ oratorical flair in arguing in favor of the death penalty." *Commonwealth v. Stokes*, 576 Pa. 299, 839 A.2d 226, 231-32 (Pa. 2003) (internal citations omitted). Furthermore, "at the penalty phase, the prosecutor has more latitude in presenting argument since the presumption of innocence is no longer applicable." *Commonwealth v. Rompilla*, 554 Pa. 378, 721 A.2d 786, 790 (Pa. 1998).

Viewed in the context of the entire statement, the underlined comment of which appellant complains was nothing more than oratorical flair; the prosecutor summarized the evidence of appellant's criminal acts and argued, from that evidence, that the jury should impose a death sentence. Accordingly, this claim is meritless.

Appellant next argues he was entitled to have the jury instructed that "life" means "life without parole," because Draper's testimony left the jury with the impression a prisoner serving a life sentence would be eligible for

parole.[15] Draper testified that when he first agreed to plead guilty in exchange for a life sentence, he was under the impression he would later be eligible for parole if he testified against appellant. N.T. Trial, 1/23/86, at 784-86. Appellant contends "this incorrect information was never corrected by the prosecutor, defense counsel or the court...," Appellant's Brief, at 76; however, the record belies this claim. During the same line of questioning which revealed Draper's former misconception about his plea agreement, defense counsel queried, "But it is your understanding now that that's not part of your agreement?" and Draper responded, "Yes." N.T. Trial, 1/23/86, at 786-87. Defense counsel also stated during closing, while arguing for the imposition of a life sentence, that appellant would "never enjoy the fruits of being a father, because he will spend his entire life in jail." N.T. Trial, 2/3/86, at 1880. Furthermore, it was clear from Draper's testimony that he believed he might later be paroled because of his testimony against appellant; there was no similar cooperation with the Commonwealth by appellant. Therefore, appellant's claim is meritless.

Appellant next claims his death sentence was the product of improper racial discrimination, citing a 1998 study conducted by Professors David Baldus and

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15. Although such instruction is mandated in cases where the defendant's future dangerousness is at issue and defense counsel requests such instruction, *see Simmons v. South Carolina*, 512 U.S. 154, 129 L. Ed. 2d 133, 114 S. Ct. 2187 (1994); *Commonwealth v. Christy*, 540 Pa. 192, 656 A.2d 877 (Pa. 1995), *Simmons* was decided four years after appellant's judgment of sentence became final and thus is inapplicable to his case. Furthermore, appellant's future dangerousness was not at issue.

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George Woodworth which concluded the odds of an African-American defendant being sentenced to death in Philadelphia are more than four times greater than for other defendants. *See* David C. Baldus, *et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998). Appellant also relies on the "McMahon tape," a 1987 videotape in which a Philadelphia assistant district attorney, Jack McMahon, revealed a policy of racial discrimination in jury selection by members of that office. *See Commonwealth v. Wharton*, 571 Pa. 85, 811 A.2d 978 (Pa. 2002).

This Court has repeatedly rejected similar arguments on the basis that the mere existence of the tape does not demonstrate prejudice in a particular case. *Rollins*, at 443 n.10; *see also Commonwealth v. Marshall*, 570 Pa. 545, 810 A.2d 1211, 1228-29 (Pa. 2002); *Commonwealth v. Lark*, 560 Pa. 487, 746 A.2d 585, 588-89 (Pa. 2000). Similarly, we have rejected speculative arguments based on the study. *See Commonwealth v. Morris*, 573 Pa. 157, 822 A.2d 684, 698 (Pa. 2003) (citing *Marshall, supra*; *Lark, supra*). Although appellant discusses the Baldus study and the McMahon tape at length, he fails to demonstrate how these alleged discriminatory trends affected the jury selection in his case. He attempts to provide statistical evidence of the prosecutor's routine practice of striking African-Americans from jury panels, but, given the actual jury composition in this case was 41.6% African-American, he fails to show discrimination by the prosecutor. As appellant does not provide a link between the study/tape and the facts and circumstances of his particular case, his claim does not warrant relief.

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Appellant next challenges this Court's proportionality review of his sentence on direct appeal, essentially claiming the data compiled by the Administrative Office of Pennsylvania Courts is unreliable and flawed. A similar argument was addressed in *Commonwealth v. Gribble*, 550 Pa. 62, 703 A.2d 426, 440-41 (Pa. 1997) (finding nothing arbitrary or capricious in proportionality review scheme), and rejected; appellant presents no compelling reason for us to revisit this issue. Furthermore, appellant fails to demonstrate any specific error resulting from this Court's application of the data to his case. Accordingly, this claim is meritless.

Finally, appellant claims the cumulative effect of all the alleged errors entitles him to relief. However, as this Court has repeatedly stated, "no number of *failed* claims may collectively attain merit if they could not do so individually." *Commonwealth v. Williams*, 532 Pa. 265, 615 A.2d 716, 722 (Pa. 1992) (emphasis in original). Accordingly, we affirm the PCRA court's denial of relief; the Prothonotary of the Supreme Court is directed to transmit the complete record of this case to the Governor, pursuant to 42 Pa.C.S. § 9711(i).

Order affirmed. Jurisdiction relinquished.

Justice BAER files a concurring opinion.

Justice NIGRO files a dissenting opinion.

Justice SAYLOR files a dissenting opinion.

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Justice BAER concurring.

I write separately only to note my view that jury instructions, such as those given here, which mirror the language of Section 9711(c)(1)(iv) of the Pennsylvania Death Penalty Statute, 42 Pa.C.S. § 9711(c)(1)(iv), impermissibly infer a requirement that any mitigating circumstance must be found unanimously by the jury in violation of *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988).[1]

Nevertheless, I join the majority opinion in all respects for several reasons. First, the majority properly disposes of the assertion on a waiver theory, noting that such claim was previously litigated on direct appeal. Second, the majority notes the United States Supreme Court's recent ruling in *Beard v. Banks*, 542 U.S. 406, 159 L. Ed. 2d 494, 124 S. Ct. 2504 (U.S. 2004), makes it clear that *Mills* does not apply retroactively to cases, such as this, that were decided prior to its issuance.[2] Finally,

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1. Section 9711(c)(1)(iv) provides:

> [T]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

2. Appellant's trial occurred in 1986, two years prior to the Supreme Court's decision in *Mills*.

the majority notes that, on direct appeal, this Court, in upholding the instruction at issue, relied on our decision in *Commonwealth v. Frey*, 520 Pa. 338, 554 A.2d 27, 31 (Pa. 1989), *cert. denied*, 494 U.S. 1038, 108 L. Ed. 2d 635, 110 S. Ct. 1500 (1990), holding that the language of the death penalty statute does not "state or infer a requirement that any given mitigating circumstance must be unanimously recognized before it can be weighed against aggravating circumstances in reaching a verdict." Thus, based upon principles of *stare decisis*, I am bound to follow our prior precedent in this regard.

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Justice NIGRO dissenting.

I dissent, as I agree with Justice Saylor that Appellant has demonstrated that his trial counsel was ineffective for failing to adequately investigate and present evidence of mitigation, including evidence of Appellant's mental health and abusive childhood, at his penalty phase hearing. Appellant, however, has presented only a boilerplate allegation that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness in this regard. Thus, as the majority notes, Appellant has not preserved an ineffectiveness claim arising from appellate counsel's deficient performance and such a claim is the only one on which relief may be granted. *See* Slip Op. at 7. Given these circumstances, I would, consistent with this Court's recent decision in *Commonwealth v. McGill*, 574 Pa. 574, 832 A.2d 1014 (Pa. 2003), remand the matter to provide Appellant with the opportunity to develop his claim as it relates to appellate counsel's performance.

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Justice SAYLOR dissenting.

I respectfully differ with the majority's reasoning in several material respects. Furthermore, I would award a new penalty hearing relative to Appellant's claim of ineffective assistance of counsel for failing to adequately investigate and develop mitigation relevant to the capital sentencing determination.

First, I disagree with the majority's assignment to Appellant's claim of racial discrimination in jury selection of a deficiency, based on the requirements established in *Commonwealth v. Spence*, 534 Pa. 233, 627 A.2d 1176 (1993), which interposes as a prerequisite to assertion of a violation under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the obligation to present a record identifying the race of the venirepersons stricken by the Commonwealth, the race of prospective jurors acceptable to the Commonwealth but stricken by the defense, and the racial composition of the jury finally selected. *See id.* at 246-47, 627 A.2d at 1182.[1] Although those seeking relief from criminal convictions have frequently had difficulty meeting these requirements, perhaps because preservation is frequently dependent on

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1. As the Court has recently observed, the United States Court of Appeals for the Third Circuit has deemed the *Spence* requirements to be an unreasonable application of federal law, at least as applied in some circumstances. *See Commonwealth v. Uderra*, ___ *Pa.* ___, ___, 580 Pa. 492, 862 A.2d 74, 2004 Pa. LEXIS 2499, 2004 WL 2363725, at *6-7 (Oct. 21, 2004) (citing *Holloway v. Horn*, 355 F.3d 707, 728-29 (3d Cir. 2004), *cert. denied*, 543 U.S. 976, 160 L. Ed. 2d 352, 125 S. Ct. 410 (2004)).

the thoroughness of trial counsel, in this particular case the trial court maintained its own, independent record concerning each of these factors, which it read into the record of the post-conviction proceedings.[2] Therefore, Appellant's assertion that the Commonwealth used 14 of 16 peremptory challenges to strike African Americans is not a bald one, as the majority indicates, *see* Majority Opinion, slip op. at 11, but is an undisputed matter of record in the case as developed and determined by the PCRA/trial judge. For the same reason, all of the other required information is squarely before the Court. *See supra* note 2.

At least in the context of an contemporaneous challenge to an in-progress jury selection proceeding, it is my position that a prosecutor's direction of 14 of 16 peremptory challenges (or almost 90 percent of the total strikes employed) toward African Amercian venirepersons, out of a jury pool comprised of less than 40 percent persons having such racial heritage, should be deemed sufficient to make out a *prima facie* case under *Batson*, thus implicating an explanation of the race-neutral bases for the challenges (if any) from the prosecutor.

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2. The record thus reflects that the total composition of the jury panel was 111 jurors, 68 of whom were Caucasian and 43 of whom were African American. The composition of the jury was seven Caucasian members, five African Americans. Total peremptory challenges asserted were 35, 16 of which were utilized by the Commonwealth to challenge two Caucasian and 14 African American venirepersons, and 19 of which were utilized by the defense to challenge 16 Caucasian venirepersons and three African Americans. *See* N.T., April 16, 1998, at 643.

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See generally Batson, 476 U.S. at 96, 106 S. Ct. at 1723 (explaining that a criminal defendant is entitled to rely upon the fact that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"); *id.* at 97, 106 S. Ct. at 1723 (observing that "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination"); *United States v. Alvarado*, 923 F.2d 253, 255-56 (2d Cir. 1991) (concluding that "a challenge rate nearly twice the likely minority percentage of the venire strongly supports a *prima facie* case under *Batson*"); *Commonwealth v. Jackson*, 386 Pa. Super. 29, 48 n.5, 49, 562 A.2d 338, 347 n.5, 348 (1989) (*en banc*). I concur in the majority's decision to affirm the denial of relief from the conviction in this case, however, as *Batson*'s burden-shifting scheme does not readily comport with the post-conviction review process when no contemporaneous objections were asserted at *voir dire*, *see Uderra*, 862 A.2d at 85-86, 2004 Pa. LEXIS 2499, 2004 WL 2363725; and, in any event, the prosecutor provided race-neutral explanations in the PCRA proceedings to the degree that her memory permitted, as well as her categorical denial of engagement in the pernicious practice of discrimination. *See* N.T., April 16, 1998, at 648-732. Although it would have been preferable for the PCRA court to render more specific factual findings and conclusions of law on the *Batson* claim, particularly given the pattern emerging out of the strikes, it is apparent that the court acted in its capacity as fact finder to accept the prosecutor's testimony on the ultimate issue concerning her motivations.

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A second area of difference involves the review of Appellant's claim that the aggravating factor in Section 9711(d)(6) of the death penalty statute (killing committed during the perpetration of a felony) was improperly applied to him because he may have been convicted on the basis of the trial court's instruction as to accomplice liability rather than as the actual killer. *See* Majority Opinion, slip op. at 6-7. What is most troubling about this issue is that the Court's prior treatment of it on direct appeal, presently relied upon by the majority as a basis for denying further review, is glaringly superficial and incorrect. In this regard, the Court reasoned that Appellant could not have been convicted by the jury as an accomplice, because a first-degree murder conviction necessarily equates with a finding that the defendant struck the fatal blow. *See Commonwealth v. Williams*, 524 Pa. 218, 233-34, 570 A.2d 75, 83 (1990) (indicating that "this argument [*i.e.*, that Appellant might have been convicted as an accomplice], when raised in the context of the penalty stage, does not even reach the level of speciousness; it is simply ludicrous. The very same jury, less than twenty-four hours before, had just convicted appellant of first degree murder."). The Court so reasoned despite the fact that the trial court had issued a general accomplice liability instruction at the guilt phase of Appellant's trial,[3] and with no accounting

3. *See* N.T., February 3, 1986, at 1750 ("It will be your duty in this case to determine whether Amos Norwood died as a result of injuries inflicted upon him by this defendant or whether this defendant was an accomplice of the person who actually inflicted the injuries, and if so, whether such killing amounted to murder of the first degree[.]"), *id.* at 1768-70 (general accomplice liability instruction). The accomplice liability charge presumably was

for the established law that a defendant can be convicted of first-degree murder based on an accomplice liability theory without the necessity of his direct participation in the actual killing. *See, e.g., Commonwealth v. Smith*, 480 Pa. 524, 528-29, 391 A.2d 1009, 1011 (1978).

Moreover, as the majority notes, the Court has separately determined that the in-perpetration-of-a-felony aggravator does not apply to one who is convicted of first-degree murder merely as an accomplice. *See Commonwealth v. Lassiter*, 554 Pa. 586, 595, 722 A.2d 657, 662 (1998) ("[Section] 9711(d)(6) may not be applied to an accomplice who did not 'commit' the killing in the sense of bringing it to completion or finishing it.").[4]

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issued at the Commonwealth's instance precisely to account for the possibility that one or more jurors might give some credence to the defense evidence to the effect that Appellant left the company of the victim at a time when he was unharmed but under restraint by Michael Hopkins and Marc Draper. *See, e.g.*, N.T., January 27, 1986, at 1182-84.

4. Although *Lassiter* is a plurality opinion, six Justices agreed that a prosecution for murder based on accomplice liability will not support the use of the aggravating circumstance set forth in Section 9711(d)(6). *See Lassiter*, 554 Pa. at 595, 722 A.2d at 661; *id.* at 599-600, 722 A.2d at 664 (Saylor, J., dissenting) ("I agree with the majority that a prosecution for murder based on accomplice liability will not support the use of the aggravating circumstance set forth in Section 9711(d)(6) of the Judicial Code."). Additionally, I do not believe that there is any retroactivity concern regarding *Lassiter*, since it merely represents a plain-text reading of a substantive provision of statutory law that was in place at the time of Appellant's trial. *See Lassiter*, 554 Pa. at 593, 722 A.2d at 660-61 (stating that "we believe that this matter can and must be resolved by reference to the text and plain meaning of the statute itself").

Appellant, however, was deprived of the benefit of a determination in this regard in his direct appeal by this Court's failure to cognize rudimentary aspects of the law of accomplice liability and its potential role in the jurors' determination of Appellant's guilt of first-degree murder. In the face of appellate court error that is so apparent, I have substantial difficulty with application of the bar of previous litigation, as I believe that such application is in tension with the courts' constitutional obligation to assure that the writ of habeas corpus remains unsuspended. *See* Pa. Const. art. I, § 14.[5]

Regarding the ineffectiveness claim relative to counsel's failure to investigate and adduce adequate mitigation in the penalty phase, the governing standards are well established. In general, capital defense counsel are obliged to conduct reasonable investigations or reach reasonable decisions that make a particular investigation unnecessary. *See Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984); *Commonwealth v. Basemore*, 560 Pa. 258, 289, 744 A.2d 717, 735 (2000). In the context of the penalty phase of a capital case, counsel has a duty to thoroughly investigate a defendant's background, *see Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 1515, 146 L. Ed. 2d 389 (2000), including the obligation to "discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the

5. This issue is also more significant to my analysis than it is to the majority's, given my position, developed below, concerning counsel's stewardship in connection with the jury's finding of no mitigation.

prosecutor.'" *Wiggins v. Smith*, 539 U.S. 510, 156 L. Ed. 2d 471, 123 S. Ct. 2527, 2537 (2003) (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, 11.4.1(C), p. 93 (1989)).[6] The reasonableness of a particular investigation depends upon evidence known to counsel, as well as evidence that would cause a reasonable attorney to conduct a further investigation, *see id.* at 526-27, 123 S. Ct. at 2538; however, strategic decisions made on the basis of an inadequate investigation can be deemed reasonable only to the extent that reasonable professional judgment supported the limitations on the investigation. *See id.* at 529, 123 S. Ct. at 2539. Finally, in terms of the reasonable basis and prejudice prongs of the ineffectiveness inquiry, relief is available only in cases in which it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. *See Commonwealth v. Williams*, 557 Pa. 207, 248, 732 A.2d 1167, 1189 (1999).

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6. I make substantial reference herein to the ABA Guidelines, realizing that this Court has not endorsed or adopted them on a wholesale basis. The United States Supreme Court, however, has referenced these Guidelines in terms of articulating prevailing norms for effective counsel. *See, e.g., Wiggins*, 539 U.S. at 522-523, 123 S. Ct. at 2536-37. In any event, in my view, the drafters' claim that the Guidelines "embody the current consensus about what is required to provide effective defense representation in capital cases," ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 1.1, commentary (rev. ed. Feb. 2004) [hereinafter, ABA GUIDELINES], is not an exaggerated one.

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Here, the record shows fairly plainly that counsel was remiss in his penalty-phase investigation and preparation. Although it was his first capital penalty proceeding, *see* N.T., April 24, 1987, at 15, counsel apparently failed to meet personally with Appellant until one week prior to trial. *See* N.T., January 6, 1986, at 25, 31-33; N.T., April 16, 1998, at 755.[7] Furthermore, it is undeniable that competent counsel would have reviewed records from Appellant's

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7. Counsel's primary excuse in this regard centered on his practice of using associates. *See, e.g.*, N.T., January 6, 1986, at 22. There is little in the record, however, to suggest that there was actual, meaningful pre-trial preparation undertaken by Appellant's associates. Moreover, I have difficulty with the proposition that lead capital counsel can expect to develop the kind of trust relationship with his client that is essential to effective representation without meeting his client substantially in advance of trial. The ABA Guidelines' commentary explains:

> Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea. Client contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client. An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial . . .. Even if counsel manages to ask the right questions, a client will not — with good reason — trust a lawyer who visits only a few times before trial . . ..

ABA GUIDELINES, 11.4.1(C), commentary.

other criminal proceedings (particularly since they were in issue in the case in terms of the Commonwealth's assertion of the significant-history-of-violent-felony-convictions aggravator). *See* generally ABA GUIDELINES 1.1, commentary ("stating that "if the defendant has any prior criminal history, . . . defense counsel accordingly must comprehensively investigate"); *id.* 10.7, commentary (same). Thus, counsel would have become aware of the prior, pre-sentence investigation in Appellant's criminal record indicating that he had a recent psychotic episode and was a candidate for psychiatric evaluation and treatment. *See* N.T., April 16, 1998, at 763, Ex. C-2; *see* also N.T., April 8, 1998, at 81. This, in turn, would trigger an obligation on counsel's part to undertake a further investigation into his client's mental health. According to expert testimony adduced by Appellant at the PCRA hearing that was not specifically rejected by the PCRA court (and common sense), a capital defendant's history of having had a psychotic episode absolutely requires further investigation.[8] Instead, what occurred is that counsel

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8. *See* N.T., April 8, 1998, at 87-88 (testimony from a psychiatrist that a psychotic episode "absolutely" would have required further investigation); N.T., April 9, 1998, at 373 (psychologist describing the event as a "red flag" and "alerting signal"); N.T., April 13, 1998, at 549 (psychiatrist indicating that the report showed that "something [was] grossly wrong"); *cf. Commonwealth v. Fears*, 575 Pa. 281, 836 A.2d 52, 72-73 (2003) (finding that an ineffectiveness claim had arguable merit where trial counsel failed to investigate potential psychiatric evidence). *See* generally ABA GUIDELINES 4.1, commentary (observing that "mental health issues are so ubiquitous in capital representation that the provision of resources in that area should be routine"); *id.* 4.1, commentary ("In particular, mental health experts are

apparently, and inappropriately, relied upon his own assessment of Appellant to discount involving a mental health professional, N.T., Jul. 1, 1987, at 60-61.[9] Notably, as well, since counsel first observed Appellant immediately before trial, the opportunity to develop mental health evidence upon his observations was severely constrained.[10]

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essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses on death row."); *id.* (observing that "the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase[;] . . . counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination.").

9. *Cf. Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997) (finding deficient stewardship arising from capital trial counsel's failure to investigate and present mitigating evidence at the penalty phase "because he did not think that it would do any good"); *accord* ABA GUIDELINES, 4.1 ("Counsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions (*e.g.*, post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance." (footnote omitted)).

10. Trial counsel also did not seem to be versed in the use of psychiatric evidence as mitigation, as reflected in the following interchange from the PCRA hearing:

> Q: Do you know what it means to have a paranoid delusional system?
> A: Uhm, today I can't give you a working definition, no.
> Q: Do you know what psychosis is?
> A: Today vis-à-vis this case, no.
> Q: I'm sorry.

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Evidence adduced at Appellant's post-conviction hearing indicated that, had counsel undertaken such an investigation by exploring Appellant's life history and having Appellant examined by a defense expert from the mental health field, he would have uncovered a history of emotional and physical trauma, and chronic and major psychiatric illness in place as of the time of Appellant's offenses. The evidence developed at hearing, if believed (and the PCRA court did not render any findings rejecting it on credibility grounds), revealed that Appellant was reared in a severely dysfunctional family, with members' relationships characterized by

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A: No.

* * *

Q: Do you know the interaction between impulsivity and post-traumatic stress disorder?
[PROSECUTOR]: Objection.
Q: (continued) If any.
THE COURT: I'm going to sustain it. That's enough. That's enough.
[THE COURT]: Your basic position is, reading the report, without knowing what all the things are, it was your strategy then not to proceed with psychiatric testimony; is that correct?
A: That's absolutely correct.
Q: Would your strategy be any different today?
A: No, not at all.
[PCRA counsel]: But you don't know what any of this means?
[THE COURT]: You can argue that.

N.T., April 13, 1998, at 801-02.

neglect, abandonment,[11] and routine violence that was often vicious,[12] and sometimes public. *See* N.T., April 9, 1998, at 497-98. The evidence also depicted Appellant's enlistment by his mother into the pattern of abuse. *See* N.T., April 9, 1998, at 302-03 (testimony of Appellant's sister describing incidents in which Appellant and his brother were told by the mother to tie the sister to the bed, in preparation for a beating). Furthermore, there was evidence that Appellant was subject to multiple sexual

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11. *See, e.g.*, N.T., April 8, 1998, at 269-70 (testimony of Appellant's brother observing that, in interactions between Appellant and a stepfather, the stepfather "acted like [Appellant] wasn't there").

12. *See, e.g.*, N.T., April 8, 1998, at 195 (testimony of Appellant's mother that she beat his head against a wall, "picked him up and threw him down the flight of steps and I beat him like Muhammad Ali"); *id.* at 196 ("I would beat [Appellant] very often . . .."); *id.* at 197-200 (description of interspousal violence, including blackjacking witnessed by Appellant); *id.* at 216 (testimony of a school teacher concerning uncontrolled rages on the part of Appellant's mother and "huge explosions" between her and Appellant's stepfather); *id.* at 256 (testimony of Appellant's older brother that the mother beat the children with "a belt, a board, a stick, a brick, a switch, whatever she got in her hand . . .."); *id.* at 255-56 (testimony of the brother concerning his having assumed the role of abuser with respect to the younger children in the household); N.T., April 9, 1998, at 298 (testimony of Appellant's sister to beatings "with brooms, sticks, belts, pots and pans, knives, shoes, chairs"); *id.* at 298 (describing the intentional scalding of Appellant's sister by his mother); *id.* at 492-95 (testimony of a friend concerning the "raging" behavior of Appellant's stepfather, describing the violence as a "family ritual"); N.T., April 13, 1998, at 620-32 (testimony of a neighborhood resident and family friend concerning the family history of violence).

victimizations (including sodomy) during his childhood, in the local neighborhood and a youth placement facility, and at the hands of a teacher.[13] Additionally, it was developed that Appellant, as a child, engaged in acts of self-abuse and mutilation, characteristic of people in distress. *See, e.g.*, N.T., April 8-9, 1998, at 204, 332.

Post-conviction testimony was also adduced from expert witnesses from the mental health field to develop the effects of the sort of trauma described in the evidence on a child's mental and emotional development, in terms of its impact in generating humiliation, shame, depression, and feelings of helplessness, as well as impeding the development of a sense of self-worth, *see, e.g.*, N.T., April 8-9, 1998, at 48, 325, 327, 333-34; N.T., April 13, 1998, at 534; the fostering of repressed and overt anger, *see, e.g., id.* at 66, 97, 349, facilitation of aggressiveness as a behavior, *see, e.g., id.* at 49; and yielding the sorts of repressive, disassociative, and impulsive responses and behaviors that are prevalent among abused children. *See, e.g.*, N.T., April 9, 1998, at 388; N.T., April 13, 1998, at 532. *See* generally N.T., April 13, 1998, at 543 (testimony of Ralph Kauffman, M.D., describing the "whole fabric of abusive relationships that have these kind of power dynamics of abuser/abused"). The expert evidence also indicated the role of the abuse in Appellant's diagnosis as suffering from major mental health disorders as of the commission of the killing underlying his death sentence. *See, e.g.*, N.T., April 8, 1998, at 42-43, 106 (testimony of Dr. Kessel, *inter alia*, chronic post-traumatic stress disorder and major

13. *See, e.g.*, N.T., April 8, 1998, at 193 (testimony of Appellant's mother describing his sodomization).

depression, Axis I diagnoses); N.T., April 9, 1998, at 373 (testimony of Dr. Patricia Fleming, a clinical psychologist experienced in working with abused children); N.T., April 13, 1998, at 520-21, 551 (Dr. Kauffman).[14]

It is my position that the mitigation evidence presented on post-conviction review represented a substantially better case in favor of imposition of a life sentence and against death than reliance solely on the athletic-achievement-and-community-participation approach that the majority attributes to trial counsel. This is particularly so, in my view, given trial counsel's sub-standard, single-paragraph argument to the jury on this latter score.[15] Moreover, to the extent that the jurors

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14. Notably, the Commonwealth presented no contrary testimony from an expert witness examining Appellant for purposes of rebutting the case of psychiatric mitigation. *Compare Commonwealth v. Lopez*, 578 Pa. 545, 557-58, 854 A.2d 465, 472 (2004) (Saylor, J., concurring) (concurring in the denial of post-conviction relief in a case in which the Commonwealth presented testimony of an expert psychiatrist, credited by the PCRA court, to the effect that the appellant suffered from no mental health deficits).

15. Oddly, this was put to the jury, not for the reasons that the majority suggests (to show some other side to Appellant), but rather, as follows:

> [Appellant's] athletic ability, his physical ability will now work to his detriment. If you ever heard of a book, The Belly of the Beast, it vividly describes prison life. There is no impediment, because of his physical stature, to living all of the evils, all of the detriments, all of the brutalities that are associated with prison life. He will have them to the fullest.

on their own might have been inclined to view the athletic-achievement-and-community-participation evidence as mitigating, the Commonwealth's response could readily have been anticipated,[16] and blunted by the presentation of the fuller perspective concerning Appellant's life that trial counsel never uncovered.

I also believe that the PCRA court's approach in rejecting the ineffectiveness claims arising out of counsel's

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N.T., February 3, 1986, at 1880-81. The entire penalty-phase closing argument for the defense consists of only four pages of transcript. *See id.* at 1877-81; *cf. Douglas v. Woodford*, 316 F.3d 1079, 1087-89 (9th Cir. 2003) (finding counsel ineffective, *inter alia*, for failing to adequately present the material that he did have "to the jury in a sufficiently detailed and sympathetic manner").

16. The district attorney argued:

> Now, I dare say, ladies and gentlemen . . . that everyone was shocked and dismayed that their hero, their quarterback, their athletic star, was guilty of such a horrible crime . . . the defendant presents an image of a person who had all kinds of advantages. Such a person would be able to essentially make the best possible life for himself and for the people that have loved him and cared for him . . .. He had a girlfriend and a child and friends and supportive teachers and people who I suggest to you looked up to him because he was gifted. He had the gift of an athletic ability that would have permitted him to do whatever he wanted with his life. He had the opportunity to not only finish high school but to go on to college. He could have made whatever he wanted out of his life but what did he do instead?

N.T., Feb. 3, 1986, at 1874-76.

failure to investigate and present the life-history and mental-health mitigation evidence is a flawed one. The court offered two reasons for rejecting the life-history mitigation: first, that some evidence of the abuse of Appellant at the hands of his stepfather was actually put before the jury at the penalty phase of his trial, and second, that Appellant failed to cooperate in obtaining witnesses. Although the court is correct that testimony was in fact adduced at trial briefly describing abuse by the stepfather, the evidence was not developed by trial counsel for defense purposes. Rather, it was adduced by Commonwealth for its own purposes during its cross-examination of Appellant's mother, *see* N.T., Feb. 3, 1986, at 1856-57; moreover, trial counsel did not argue that it should be considered to be mitigating in his exceptionally brief penalty-phase summation. *See* N.T., Feb. 3, 1986, at 1877-81. Additionally, trial counsel had not offered (and was obviously unprepared to offer) expert testimony from a mental health professional to establish a concrete framework concerning why the evidence that was heard should be considered mitigating.

Regarding the PCRA court's indication that Appellant failed to cooperate with the production of witnesses, trial counsel's testimony was highly equivocal. Most times, counsel merely highlighted Appellant's expectation that counsel would defend the guilt-phase vigorously,[17]

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17. Contrary to counsel's frequent suggestions on the PCRA record, a capital defendant's insistence on defending against conviction is not an excuse to omit penalty-phase preparations. *Compare* N.T., April 17, 1998, at 760 (trial counsel's testimony that "[u]hm, I would just continue to urge you to what I — that

and denied having a specific recollection concerning discussions of mitigation.[18] Moreover, counsel substantially qualified his assertions of non-cooperation on Appellant's part, as follows:

> Q: Did Mr. Williams or his mother in any way prevent you from interviewing either those witnesses or other mitigation witnesses?
>
> A: Only to the extent that he had me focus on the guilt phase and that you have a certain amount of time. Remember what I said to you, I had negotiated to, where had he wanted it,

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[Appellant's] focus was that he was not guilty, uhm, and that was the general direction that we went in"); *id.* at 779 ("[Appellant] was very interested in being found not guilty. That was his — that was the focus . . .."); *id.* at 771 ("See, I'm a very busy person."); *id.* at 760 ("I'm going to say this one more time. I could have saved this man's life. We had negotiated a plea to where he could have gotten a life sentence."), with ABA GUIDELINES 10.7 ("Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty."). Notably, in the face of such expressions by counsel at trial, the trial court reminded counsel of Appellant's constitutional right to be tried by a jury, and the continuing obligations of counsel to adequately prepare and perform. *See* N.T., January 6, 1986, at 19, 25.

18. N.T., April 17, 1998, at 752 ("I don't have a specific recollection of having an independent thought process relative to guilt or penalty."); *id.* at 756 ("if you ask me a question relative to when we discussed mitigation and things, I don't really have a recollection"); *id.* at 766 ("No, you asked me if I have a recollection of [my thought process], I don't.").

> he could have had a consecutive life sentence. That's not what he wanted. He wanted to try the case. Okay?

N.T., April 17, 1998, at 768. Since the evidence indicates that Appellant did not affirmatively impede counsel's investigation in the relevant regard, I fail to see that counsel's inability or unwillingness to commit the time necessary to develop a defense as to all aspects of a capital case should be accepted as an excuse for his lack of preparation.[19] Similarly, Appellant's failure to identify

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19. Notably, the ABA Guidelines also add the following perspective concerning the sort of representation that was afforded here:

> Often, so-called "difficult clients" are the consequence of bad lawyering — either in the past or present.
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> * * *
>
> Some clients will initially insist that they want to be executed — as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to simply acquiesce to such wishes, which usually reflect the distorting effects of overwhelming feelings of guilt and dispair rather than a rational decision in favor of a state-assisted suicide.

ABA GUIDELINES 10.5, commentary; *cf.* ABA GUIDELINES 10.7A(2) ("The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented."); *id.*, commentary ("Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed

and raise the strategy on his own, *see, e.g.*, N.T., April 17, 1998, at 765 (trial counsel's testimony, indicating that Appellant's history of abuse was "not something he particularly raised with me"),[20] can hardly be accepted as a means of avoiding the finding of ineffectiveness. *See Commonwealth v. Malloy*, 579 Pa. 425, 856 A.2d 767, 788 (2004) ("The onus is not upon a criminal defendant to identify what types of evidence may be relevant and require development and pursuit. Counsel's duty is to discover such evidence through his own efforts, including pointed questioning of his client.").

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decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case."); *accord Blanco v. Singletary*, 943 F.2d 1477, 1501-02 (11th Cir. 1991) (finding trial counsel ineffective where "the ultimate decision that was reached not to call witnesses [in mitigation] was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto defendant's statements that he did not want any witnesses called").

20. The following interchange between post-conviction and trial counsel is also representative:

> Q: Did you explore or investigate whether there was any question of in Mr. Williams' background in regards to childhood abuse or family dysfunction?
> A: He never, ever discussed anything like that with me.
> Q: Did you ask?
> A: Did I ask?
> Q: Did you ask?
> A: I honestly don't recall, but I'm sure I would have had discussion, is there anything you want me to bring out?

N.T., April 13, 1998, at 761-62.

Appendix S

The PCRA court's opinion also does not diffuse the import of the mental health mitigation evidence. In this regard, the court's analysis primarily entailed identification of a few discrete weaknesses in facets of Appellant's expert testimony, but it failed to squarely confront the overall purport of the testimony. For example, while criticizing one expert for failing to render an ultimate conclusion concerning Appellant's ability to conform his conduct to the requirements of the law at the time of his offense, the PCRA court merely disregarded the extensive testimony of Appellant's primary expert witness, a forensic psychiatrist, to the effect that Appellant suffered from extreme mental or emotional disturbance at the time of his offense. *See, e.g.,* N.T., April 8, 1998, at 106. *See generally* 42 Pa.C.S. § 9711(e)(2) (indicating that mitigating circumstances shall include that "the defendant was under the influence of extreme mental or emotional disturbance"). Indeed, the PCRA court made no mention in its opinion of the testimony of the forensic psychiatrist, Dr. Julie Beth Kessel, or her conclusion implicating the mitigating circumstance at Section 9711(e)(2), which was never presented to Appellant's capital sentencing jury.

The PCRA court's position concerning mental health mitigation is punctuated by its categorical statement that evidence that tends to show impulsiveness and anti-social behavior will not be regarded by jurors as mitigating. *See, e.g.,* PCRA Court Opinion, slip op. at 14 (stating that the fact "that Petitioner's judgment [may have been] impaired and that his response to social judgment questions indicated that he would respond impulsively in stressful situations in a manner without regard for the

consequences of his actions and their impact on others . . . cannot be characterized as beneficial to petitioner"). This sort of reasoning, in my view, does not constitute fact finding tied to the individual circumstances of the case, but rather, represents a philosophical position that is contrary to decisions of the United States Supreme Court that have recognized the potency of life-history and mental-health mitigation in terms of capital sentencing, *see, e.g.*, *Wiggins*, 539 U.S. at 510, 123 S. Ct. at 2527; *Williams*, 529 U.S. at 396, 120 S. Ct. at 1495,[21] the ABA Guidelines, and the experience of the Defender Association of Philadelphia and other legal service providers in the capital arena which recognize the Guidelines' approach.

The PCRA court's position concerning the connotation of impulsivity or anti-social behavior arising out of the evidence is also highly superficial, in that it fails to take into account the reality that, in any capital trial in which guilt has been established, the jurors already are well aware that the defendant has engaged in impulsive, aberrant, and/or anti-social behavior. Indeed, the

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21. The majority distinguishes the United States Supreme Court's decision in *Williams* on the basis that the familial abuse present in *Williams* was substantially greater based on the fact that the parents had been incarcerated for it. *See* Majority Opinion, slip op. at 22 n.12. It cannot reasonably be disputed, however, that the type of conduct described in the evidence here was equally deserving of punishment (and/or treatment if the requisite culpability on the part of the perpetrators was not present), had intervention occurred. Moreover, it does not seem to me that the presence or absence of governmental detection and/or intervention should be deemed controlling.

defendant has at least once perpetrated the ultimate act of this kind, *i.e.*, the unjustified killing of a human being with specific intent and malice. In this case, moreover, the Commonwealth had legitimately put before the jury not only Appellant's conviction for the present murder, but also a fairly extensive series of other serious violent felonies. Accordingly, there seems to me to have been little danger in an attempt to establish some broader context for Appellant's behavior in terms of mitigation, which was precisely trial counsel's role. In this regard, the role of life-history and mental-health mitigation evidence, where it is available, is not to try to excuse that behavior (which in any event will be subject to severe punishment),[22] but rather (and only) to attempt to convey that there is some factor or factor that militates against the exercise of governmental power to extinguish the defendant's life.[23]

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22. *Accord* ABA GUIDELINES 10.11, commentary ("None of this evidence should be offered as a counterweight to the gravity of the crime, but rather to show that the person who committed the crime is a flawed but real individual rather than a generic evildoer[.]").

23. *Accord Simmons v. Luebbers*, 299 F.3d 929, 938-39 (8th Cir. 2002) ("By the time the state was finished with its case, the jury's perception of Simmons could not have been more unpleasant. Mitigating evidence was essential to provide some sort of explanation for Simmons's abhorrent behavior. Despite the availability of such evidence, however, none was presented. Simmons's attorneys' representation was ineffective."), *cert. denied*, 538 U.S. 923, 123 S. Ct. 1582, 155 L. Ed. 2d 314 (2003); *Ainsworth v. Woodford*, 268 F.3d 868, 876 (9th Cir. 2001) (indicating that the introduction of expert testimony in mitigation would also have been important to explain the effects that serious physical and psychological abuse and neglect as a child had on the defendant); ABA GUIDELINES

Particularly as the General Assembly has recognized the presence of major mental or emotional infirmity as a specific category of mitigation, *see* 42 Pa.C.S. § 9711(e)(2), courts of law should be hard pressed to effectively rule them out categorically in instances in which they have been overlooked by counsel.[24]

The majority's reasoning overlaps with that of the PCRA court, and, for that reason, fails to persuade me. In addition, the majority absolves counsel of his failure to conduct further investigation into a documented psychotic episode and associated recommendation of psychiatric treatment, based on the absence of an indication of a previous psychiatric history. *See* Majority Opinion, slip op. at 20. In my view, however, neither the absence of any self-recognition or reporting on the part of a criminal

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10.11, commentary (noting that expert testimony may explain the effects of mental impairments on the defendant's judgment and impulse control).

24. The PCRA court and the Commonwealth certainly are not incorrect in their assertion that some jurors may not view a pattern of violent and impulsive behavior arising from disassociation, repressed anger, and mental health infirmity as mitigating, no matter what the source or degree of the impairment. But it is equally undeniable, as experience has shown in capital cases, that some jurors will in some situations view this as mitigating, and, in our system of justice, it takes a single juror of twelve to avoid the imposition of a capital sentence. *See Wiggins*, 539 U.S. at 537, 123 S. Ct. at 2543 (explaining that the context in which courts are to review the prejudice prong of the ineffectiveness inquiry is in terms of whether "there is a reasonable probability that at least one juror would have struck a different balance").

defendant concerning a mental health diagnosis and/or a prior record of intervention and treatment controls the obligations of counsel who has or should have become aware of psychiatric involvement, particularly since those suffering from mental illness frequently remain untreated and unaware of psychiatrically recognizable illnesses. *See supra* note 8; *accord Averhart v. State*, 614 N.E.2d 924, 930 (Ind. 1993) (finding capital defense counsel ineffective, *inter alia*, for naively placing undue emphasis on the contents of a pre-sentence report in terms of the production of his own case for mitigation).

In summary, I believe that the record paints a fairly stark picture of penalty-phase ineffectiveness of counsel, as it reflects an inadequate investigation and the making of strategic decisions and recommendations on an uninformed basis. Moreover, as I am unable to conclude that at least one juror might not have credited the mitigation that should have been presented in favor of life imprisonment and found its weight at least equal to the Commonwealth's case for death, I would award a new penalty hearing, or, at a minimum, remand for proceedings consistent with *Commonwealth v. McGill*, 574 Pa. 574, 832 A.2d 1014 (2003), were that to be deemed necessary by the Court.

Finally, on the issue of the availability of an instruction under *Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994), I agree with the majority that *Simmons* is not retroactive in its application. *See* Majority Opinion, slip op. at 24 n.15. I differ with the majority's indication that Appellant's future dangerous

was not before the jury in this case, however,[25] as it does not appear to be in keeping with recent decisions of the United States Supreme Court. *See Kelly v. South Carolina*, 534 U.S. 246, 253-54, 122 S. Ct. 726, 731-32, 151 L. Ed. 2d 670 (2002).

25. *See, e.g.*, N.T., Feb. 3, 1986, at 1876-77 (penalty-phase summation of the district attorney arguing that Appellant "terrorized, he robbed, he [p]lundered, and he killed, and he continued to kill . . .. I am asking you, ladies and gentlemen, to impose the death penalty because our system of justice must stop him. He must be stopped.").

APPENDIX T — OPINION OF THE SUPREME COURT OF PENNSYLVANIA, DATED FEBRUARY 8, 1990

SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

No. 98 E.D. Appeal Dkt. 1987

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

TERRANCE WILLIAMS,

Appellant.

October 23, 1989, Argued
February 8, 1990, Decided

Defendant was found guilty of first-degree murder, criminal conspiracy, and robbery, and appealed from judgment of sentence of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, Nos. 2363, 2365 and 2367 of August Term 1984, David Savitt, J., sentencing him to death. The Supreme Court, No. 98 E.D. Appeal Dkt. 1987, McDermott, J. held that: (1) prosecution could cross-examine defense witness about homicides for which he stood convicted but not yet sentenced; (2) no reversible error arose out of prosecution's asking defendant about whether he was suspect in

another death; (3) fact that defendant was only 18 years and four months of age at time of murder was not per se mitigating circumstance; and (4) trial counsel did not render ineffective assistance either during guilt phase or penalty phase of trial.

Affirmed.

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JUDGES: Nix, C.J., and Larsen, Flaherty, McDermott, Zappala and Papadakos, JJ.

OPINION

McDERMOTT, Justice

The appellant, after a trial by jury, was found guilty of first degree murder,[1] criminal conspiracy,[2] and robbery.[3] In the penalty stage of the trial, the same jury found two aggravating circumstances and no mitigating circumstances. Accordingly, appellant was sentenced to death on the first degree murder charge.[4] Subsequent to trial, appellant retained private counsel and his appointed trial counsel was permitted to withdraw. His new counsel filed lengthy and detailed post-trial motions, including a

1. 18 Pa.C.S. §§ 2501; 2502(a).

2. 18 Pa.C.S. § 903.

3. 18 Pa.C.S. § 3921.

4. 42 Pa.C.S. § 9711.

motion to vacate the death penalty. Also, appellant was permitted to file additional *pro se* motions containing multiple averments of trial error, prosecutorial misconduct and ineffectiveness of trial counsel. After a hearing, all post-trial motions were denied and formal sentence was imposed. In addition to the death penalty on the first degree murder charge, appellant was sentenced to a term of five (5) to ten (10) years on the conspiracy charge and ten (10) to twenty (20) years on the robbery charge, with the additional sentences to run consecutive to each other but concurrent to the death penalty sentence. The judgments of sentence were appealed directly to this Court.[5]

The facts underlying appellant's convictions are as follows.[6] In the late afternoon on Monday, June 11, 1984, appellant and Marc Draper, both eighteen years old at the time, were gambling with a few other unidentified persons on the corner of Mount Pleasant Avenue and Lincoln Drive in Philadelphia. The two, who had been close friends since third grade, both lost all their money while gambling. After conferring as to potential sources of additional funds, appellant advised Draper that he knew a man, Amos Norwood, who lived nearby from whom they could extort money. Unfortunately for Mr. Norwood, age 56, extortion was merely the opening scene in his personal tragedy.

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5. 42 Pa.C.S. § 722(4) and 42 Pa.C.S. § 9711(h).

6. The activities of appellant prior to and at the time of the murder are based primarily on the testimony of appellant's co-murderer, Marc Draper.

Appendix T

After discussing the proposed extortion, appellant and Draper then proceeded to the Norwood residence. While Draper waited at a nearby corner, appellant spent fifteen minutes in Norwood's house before rejoining Draper with ten dollars he had secured from Norwood. As he was exiting Norwood's residence, appellant crossed paths with Norwood's wife, Mamie. Although they did not know each other, appellant said hello to Mrs. Norwood as she passed by. Draper witnessed this exchange, although he did not know Mr. or Mrs. Norwood.

After securing the ten dollars from Norwood, appellant and Draper returned to the scene of the gambling but the participants had taken a break and were merely "rapping" i.e. talking. The pair remained, talking with the others. As misfortune would have it, Mr. Norwood, two or three hours later while on his way to his church to do some volunteer work, was driving by the intersection where the "rapping" was occurring. Appellant, upon seeing Norwood, flagged his car down, got in the car and drove away. A few minutes later, he returned with Norwood to the intersection, got out of the car and said to Draper "play it off like you going home, like you want to ride home, and we gonna take some money." Draper, grasping appellant's plan, got in the car with appellant and Norwood, and proceeded to give Norwood false directions home, leading Norwood instead to a dark secluded area adjacent to a cemetery.

At that point, Draper, who was in the rear driver's side seat, grabbed Norwood from behind and appellant, in the front passenger seat, ordered Norwood to "be quiet and get out of the car." Appellant, Draper and Norwood

exited the car, climbed over a small fence and proceeded into the cemetery. Upon arriving at some tombstones, Norwood was ordered to lie face down. Appellant and Draper searched Norwood and found twenty dollars hidden in his sock. While Norwood was begging for his life, the assailants tied his hands behind his back with his shirt, tied his legs together with his pants and stuffed his socks in his mouth.

Appellant then told Draper, "Wait, I'm going to the car . . . We're getting ready to do something." He then went to the car and returned with a socket wrench, which he gave to Draper, and a tire iron. After some discussion between appellant and Draper,[7] appellant commenced repeatedly hitting Norwood about the head with the tire iron. Appellant, while hitting the victim, said to Draper, "Man, you with me. We got to do this together." Whereupon, Draper joined in the brutality, striking Norwood's head repeatedly with the socket wrench, while appellant was smashing him with the tire iron.

Finally, when they perceived the victim was dead, the beating stopped and the body was hidden behind two tombstones and covered with some loose brush. The pair then returned to the victim's car, emptied the contents of the glove compartment into a trash bag and dumped the bag into a nearby trash bin. They then drove to Draper's

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7. According to Draper, this discussion included the following, "I'm already in a lot of trouble. I don't need no more trouble." Upon appropriate objection, this remark was stricken from the record.

house, where he got ready for work.[8] After making arrangements to meet the next morning, Draper went to work and appellant drove the victim's car to downtown Philadelphia to meet Ronald Rucker, a friend of some two months.

Rucker testified at trial that upon meeting appellant that night, appellant called him aside and confided to him that he had just "offed" a guy named Amos. Rucker testified that although he did not believe appellant at first, he came to believe him when he noticed blood spots on appellant's shoes and when he accompanied appellant for a drive shortly thereafter in the victim's car. After dropping Rucker off very late in the evening, appellant returned to the cemetery, soaked the victim's body in gasoline and set it on fire.

The next day, appellant picked up Draper in the victim's car and together they returned to the trash bin near the cemetery. Their purpose was to retrieve the contents of the glove compartment and determine if there was anything of value to them. In the victim's wallet, they found a Mastercard and an AT & T telephone card, both in the victim's name. Appellant advised Draper that he knew a person, Ronald Rucker, who could help them make use of the credit cards. The pair then picked up Rucker and, after Rucker confirmed that the Mastercard was usable,[9] the trio drove to Atlantic City, with the intention of using the Mastercard to secure cash advances. Prior

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8. Draper worked the midnight to 8:00 A.M. shift.

9. Rucker was employed by a restaurant and was familiar with the procedure utilized to detect stolen credit cards.

to the trip to Atlantic City, Rucker and Draper had never met each other.

Upon arriving in Atlantic City, the three attempted, without success, to secure cash advances with the Mastercard at various casinos. Later in the evening, appellant slipped away from his companions and, unbeknownst to them, secured two (2) one hundred dollar cash advances on the card. While at the casinos, Ronald Rucker used the AT & T telephone card to make various telephone calls. The next day, June 13, 1984, appellant used the Mastercard, by signing Norwood's name, to purchase two gold chains at a jewelry store in downtown Philadelphia.

The charred remains of Amos Norwood's body were found by a passerby on June 15, 1984. Despite the burning and extensive decomposition, it was possible to identify his body through his dental records. Because of incautious use of the AT & T telephone card, the ensuing investigation led police to Ronald Rucker and his sister, Renee. On July 18th and 19th, 1984, Ronald Rucker gave two statements to police implicating appellant and Marc Draper. Although Rucker told appellant he was interviewed by the police, he did not tell appellant how deeply he had implicated him during the police interviews.

In any event, on July 19, 1984, shortly after Rucker's second interview with the police, appellant and Rucker took a train to New York and from there they took a cross country bus, with California as their intended destination. Throughout the journey, the two made frequent phone calls home to determine the status of the ongoing investigation.

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On July 20, 1984, Marc Draper, based on Ronald Rucker's statement to the police, was arrested and charged with homicide. Draper, the son of a Philadelphia policeman, made a full confession, describing his own role in the murder and appellant's role in the killing and aftermath.[10] On the same date, an arrest and search warrant was issued on appellant. As a result thereof, a search was conducted at appellant's residence. The search uncovered a blue jacket found in a box in appellant's bedroom. The jacket was later identified as belonging to Amos Norwood.

On July 21, 1984, after failing to locate appellant in Philadelphia, the police, through the National Crime Information Center, issued a "wanted message" regarding appellant to all police departments throughout the country. The next day, through a telephone conversation with his girlfriend, appellant discovered that there was an outstanding warrant for his arrest. On July 23, 1984, appellant returned to Philadelphia and surrendered himself to police at the office of an attorney.

Although Marc Draper was held in protective custody, appellant was able to speak with him and forward to him a series of four letters suggesting that Draper retract his prior statement and instead study and adopt the "story" contained in the letters, which "story" would exonerate appellant. Draper instead turned over the letters to the Commonwealth and they were introduced into evidence against appellant.

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10. The day after the murder, appellant confided to Draper that he had returned to the scene of the murder and set the victim's body ablaze.

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On appeal to this Court, appellant raises five issues with respect to the guilt stage of his trial and nine issues with respect to the penalty stage. Preliminarily, however, it is required of this Court in cases in which the death penalty has been imposed to independently review the sufficiency of the evidence supporting an appellant's conviction. *See Commonwealth v. Zettlemoyer*, 500 Pa. 16, 26-27, n. 3, 454 A.2d 937, 942 n. 3 (1982), *cert. denied* 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983).

The test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the verdict winner, the jury reasonably could have determined that all elements of the crime were established beyond a reasonable doubt. *See Commonwealth v. Syre*, 507 Pa. 299, 489 A.2d 1340 (1985), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1577, 94 L.Ed.2d 768 (1987). In the instant case, the Commonwealth presented direct evidence from Marc Draper, appellant's longtime friend as to appellant's actions at the murder scene. This evidence was bolstered by Ronald Rucker's testimony that appellant had admitted to him his participation in the killing and the burning of the corpse. In addition, there was testimony from Mrs. Norwood placing appellant in the victim's company on the day of the murder and appellant's own testimony that he shared the proceeds of the robbery/murder, i.e. that he used the victim's Mastercard and car. Also, by way of physical evidence, there was testimony from Ronald Rucker about appellant's blood splattered shoes and testimony from the police regarding the recovery of the victim's jacket from appellant's bedroom. Finally, there were the four letters in appellant's own handwriting

concocting a "story" which would exonerate appellant and implicate Michael Hopkins, a conveniently dead mutual friend of Draper and appellant.

Countervailing the overwhelming evidence of the Commonwealth was appellant's unsubstantiated testimony that Marc Draper and Michael Hopkins actually committed the murder and that appellant used the victim's car and Mastercard only because he thought they were the by-products of a robbery and not a murder. Also, the credibility of each of the witnesses testifying on appellant's behalf was seriously undermined on their respective cross-examinations. Especially damaging was the credibility gap created by appellant's testimony with regard to the four letters to Draper delineating the "story" to be used in Draper's proposed retraction. Appellant, after hearing testimony from a handwriting expert, admitted writing the letters but claimed that he was merely the stenographer for a story actually concocted by Draper. However, since the primary beneficiary of the "story" was appellant and his role as stenographer was fraught with inconsistencies, including remarks supposedly attributable to Draper that are addressed to Draper himself, e.g., "Now listen Marc, we have to keep in touch," his testimony was not credible.

After reviewing the entire trial transcript, including the synopsis set forth above, it is clear that there was sufficient evidence presented for the jury to have determined that all elements of the crimes for which appellant was convicted were established beyond a reasonable doubt. See *Commonwealth v. Syre, id.*

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Appellant's initial averment of error is that the trial court erred when it permitted the prosecution, on cross-examination of defense witness Porttie Robinson, to explore two homicides for which Robinson stood convicted but not yet sentenced. Robinson's testimony was to the effect that Draper, a prison mate of Robinson's, had told him that "another guy", other than appellant, had committed the murder with Draper. The prosecution brought out Robinson's homicides to establish that Robinson was biased against Draper because Draper's father, a police officer, had participated in the investigation leading to Robinson's homicide convictions. Testimony was adduced from the former prosecutor who handled the Robinson case that during discovery Draper's father's name was given to Robinson's attorney, as part of a list of officers involved in the investigation. Robinson denied knowing that Draper's father was involved in his case.

As a general rule, unsentenced convictions may not be used to impeach a witness. *See Commonwealth v. Zapata*, 455 Pa. 205, 314 A.2d 299 (1974). However, it is equally true that a party against whom a witness is called always has the right to show by cross-examination that a witness is biased or has an interest in the result of the trial. *See Commonwealth v. Cheatham*, 429 Pa. 198, 239 A.2d 293 (1968) and *Commonwealth v. Evans*, 511 Pa. 214, 512 A.2d 626 (1986). In the instant case, the introduction of Robinson's unsentenced convictions was relevant to show Robinson's potential bias against Draper because of the activities of his police officer father. Since Robinson denied any knowledge that Draper's father was involved in his investigation, it was within the province of the jury

to decide whether Robinson's testimony was tainted. See *Commonwealth v. Evans, id.*, 511 Pa. at 225, 512 A.2d 626.

Next, appellant contends that reversible error occurred when the prosecutor asked appellant, on cross-examination, whether he was a suspect in the death of one Donna Freedman, a case entirely unrelated to the Norwood murder. Appellant frames this issue by suggesting that "the prosecutor *informed* the jury that appellant was a suspect in the notorious slaying of Donna Freedman" (emphasis added). The reality, however, is that the death of Donna Freedman was first raised by appellant, in his direct testimony, by way of explaining why Draper could not tell the real story of the Norwood murder. In the scenario testified to by appellant on direct examination, since Michael Hopkins, appellant's deceased purported murderer of Norwood, and Draper murdered Donna Freedman, Draper could not implicate Hopkins in the Norwood murder for fear Hopkins would implicate him in the Freedman murder. On cross-examination, the prosecution was permitted, to a limited extent, to explore the Freedman murder to impeach appellant's scenario. When the prosecution asked appellant whether he was a suspect in the Freedman case, objection was promptly made and sustained and the question was stricken. Accordingly, in no way whatsoever was the jury "informed" that appellant was a suspect in the Freedman murder. Indeed, the Freedman murder would never have been mentioned in the trial if not for appellant's own testimony. Moreover, the trial court, on numerous occasions throughout the trial and in its instructions, advised the jury that the questions asked

by the respective attorneys were not testimony, only the answers adduced. Since there was no answer adduced with respect to whether appellant was a suspect in the Freedman murder and the issue itself was raised first by appellant, his averment of error is without merit.

Appellant's remaining three averments of error in the guilt stage of his trial involve claims of ineffectiveness of his trial counsel. As a general principle, trial counsel is presumed to be effective and a defendant has the burden of proving otherwise. *See Commonwealth v. McNeil*, 506 Pa. 607, 487 A.2d 802 (1985). Moreover, to prevail on a claim of ineffectiveness, a defendant must demonstrate that the course followed by trial counsel was unreasonable, that another meritorious course was available and that defendant was prejudiced by counsel's ineffectiveness. *See Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 235 A.2d 349 (1967) and *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987).

Firstly, appellant claims his counsel was ineffective for failing to seek a jury instruction as to the possible effect any deals between Marc Draper and the Commonwealth may have had on Draper's credibility. Appellant, however, again misstates the record. The record shows that counsel, as part of his requested charges, sought cautionary instructions as to the reliability of the testimony of (1) an "informer-interested witness", (2) an "immunized witness" and (3) an "accomplice." Indeed, the trial court's instructions included the following, "In view of the evidence of Marc Draper's criminal involvement, you must regard him as an accomplice . . . you should view the

testimony of an accomplice with disfavor because it comes from a corrupt and polluted source." Moreover, from his opening statement throughout his cross examination of Draper to the closing argument, defense counsel consistently emphasized the benefits arising to Draper from cutting a "deal" with the Commonwealth, i.e. he was permitted to plead guilty to second degree murder and receive a sentence of life imprisonment rather than face a first degree murder charge and the possibility of the death penalty. Accordingly, counsel was not ineffective with respect to the impact of Draper's deal on his credibility.

Appellant's two other allegations of ineffectiveness are related in that they both involve the definition of reasonable doubt. Appellant objects to the trial court's definition of reasonable doubt as a "doubt that would cause a reasonably careful and sensible person to hesitate before acting upon a matter of importance in his own affairs." He also objects to his trial counsel's use of the analogy of purchasing a home while discussing reasonable doubt in his closing argument. Appellant's argument is that both definitions or descriptions are "future oriented" dealing with "uncertainty and risk taking," rather than a retrospective evaluation of past events. Although appellant's argument has some facile appeal, it is thoroughly specious. He emphasizes the time component of the analogies while their real point is the relationship or connection between the level or type of doubt and the need to hesitate before acting or, in the case of a jury, making an important decision.

Furthermore, the charge of the trial court and defense counsel's analogy of the purchase of the home are, in appellant's own words, "standard" and "garden variety" examples given to juries throughout the Commonwealth. Therefore, a failure to object to such a charge or the use of such an example can hardly be considered prejudicially ineffective. *See Commonwealth v. Pierce, id* and *Commonwealth v. Lawson*, 519 Pa. 504, 549 A.2d 107 (1988).

Appellant's remaining averments of error concern the penalty stage of his trial, during which the jury found no mitigating circumstances and two aggravating circumstances, namely, that the murder occurred during the commission of a felony (the robbery) and a prior significant history of violent crimes.

Three of appellant's averments of error in the penalty stage relate to appellant's age at the time he murdered Amos Norwood. Appellant's basic contention is that being only eighteen years and four months of age at the time of the murder is a *per se* mitigating circumstance. Appellant provides no legal authority for this proposition and this Court is not aware of any. In this Commonwealth, for purposes of the Crimes Code, a person who has attained the age of eighteen is treated as an adult.[11] The jury in this case was made fully aware of appellant's age. Obviously, they did not consider it to be a mitigating circumstance. That was a decision wholly within their province and there is no legal or logical reason to overturn that decision.

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11. 42 Pa.C.S. § 6302.

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Two other averments of error relate to the recent United States Supreme Court case of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), which held that a Maryland death penalty statute was unconstitutional because it required a jury to find mitigating circumstances pursuant only to a unanimous vote. However, our statute does not require unanimity in establishing mitigating circumstances. This topic was fully addressed in *Commonwealth v. Frey*, 520 Pa. 338, 554 A.2d 27 (1989) and appellant has not presented any argument not properly disposed of in that case. The trial court's instructions in the instant case were completely consistent with the statute and our decision in *Commonwealth v. Frey, id.*

Next, appellant urges that his judgment of sentence should be overturned because the prosecutor asked appellant on cross-examination whether he was a suspect in the murder of Donna Freedman. This issue was fully addressed previously in reference to the guilt stage of appellant. That discussion is equally applicable with respect to the penalty stage.

The three remaining averments of error are claims of ineffectiveness of trial counsel. The first claim is that trial counsel was ineffective for failing to object to the introduction by the Commonwealth of several misdemeanors in attempting to demonstrate appellant's prior significant history of violent felonies.[12] Factually, the prosecution introduced evidence, without objection,

12. 42 Pa.C.S. § 9711(d)(9).

as to the facts surrounding appellant's convictions with regard to two prior violent episodes, namely, convictions relating to his invasion of the home of an elderly couple and his terrorization of the couple with a rifle and convictions relating to his murder of a man six months before the instant murder, with a baseball bat and butcher knife. The butcher knife was left imbedded in the victim's throat after he had been stabbed twenty times.

The relevant statute is 42 Pa.C.S. 9711(a)(2) which provides, *inter alia*, as follows:

> In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e).

Pursuant to 42 Pa.C.S. § 9711(d)(9), the prosecutrix in the instant case revealed to the jury the violent felonies for which appellant had been convicted previously and as part of that description listed the misdemeanor convictions arising out of the same events, e.g. in connection with appellant's third degree murder charge he was also convicted of theft and possessing an instrument of crime. The Commonwealth, in presenting its argument for the death penalty, is permitted to examine the facts surrounding the convictions of the violent felonies. *Commonwealth v. Beasley*, 505 Pa. 279, 479 A.2d 460 (1984). In the instant case, the revelation of the misdemeanor

convictions pales in comparison to the impact upon the jury of the more serious felony convictions. Thus, their revelation did not prejudice appellant's case and counsel was not ineffective for failing to object to them. *See Commonwealth v. Pierce, supra.*

Appellant also claims trial counsel was ineffective for failing to argue to the jury that the Commonwealth did not present evidence that appellant "committed a killing while in the perpetration of a felony,"[13] because there was no proof presented that appellant, rather than his co-brutalizer, Draper, landed the fatal blow. This argument, when raised in the context of the penalty stage, does not even reach the level of speciousness: it is simply ludicrous. The very same jury, less than twenty-four hours before, had just convicted appellant of first degree murder. Appellant now urges that his trial counsel was ineffective for not suggesting to the jury that appellant had not been convicted for "killing" the victim. Counsel is not required to present such patently meritless arguments even when the only straws within appellant's reach are exceedingly slippery ones. *See Commonwealth ex rel. Washington v. Maroney, supra.*

Appellant's final averment of error is that trial counsel was ineffective for failing to investigate and present appellant's "good prison record" as a potential mitigating circumstance. While it is true that *any* fact or circumstance about the defendant may be presented to a jury as a potential mitigating factor, it is not the duty

13. 42 Pa.C.S. § 9711(d)(6).

of a trial attorney to list for the defendant an exhaustive list of potential areas of mitigation; such a list would go on forever. The record in the instant case reveals that trial counsel, on a number of occasions, advised appellant that he should be prepared, in the event of his conviction, to supply counsel with factors about his life that could be seen as mitigating. Appellant failed to provide such information. Moreover, the alleged "good" record appellant now asserts is grounded in a letter dated April 13, 1987 from a corrections counselor at Huntingdon prison to appellant's appellate counsel. The letter, which addressed appellant's fourteen month stay at Huntingdon, can best be described as a lukewarm endorsement. While it notes that appellant exhibited a "cooperative attitude" in counselling sessions, it also reveals that his prior facility characterized his adjustment as "not being satisfactory at all times" and during his stay at Huntingdon, he received two conduct violations. Furthermore, if evidence of appellant's "good" prison record was introduced by trial counsel, the Commonwealth, in rebuttal, could have emphasized that during his stay at Huntingdon, appellant was passing notes to Marc Draper for the purpose of suborning perjury. All in all, it is hard to see how the presentation of appellant's prison record, as a whole, would have helped his case. Accordingly, trial counsel was not ineffective for failing to investigate and present appellant's prison record. *See Commonwealth v. Pierce, supra.*

Finally, we address the proportionality of appellant's sentence. Based on our review of the statistical data provided by our administrative offices and because of the jury's finding of two aggravating circumstances

and no mitigating circumstances, we conclude that the sentence of death was not disproportionate to the penalty imposed in similar cases. *See* 42 Pa.C.S. § 9711(h) and *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700 (1984) *cert. denied* 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984). The convictions and sentences imposed below are hereby affirmed.

APPENDIX U — MEMORANDUM AUTHORIZING DEATH PENALTY PROSECUTION, DATED JANUARY 21, 1986

CITY OF PHILADELPHIA

DATE 1/21/86

MEMORANDUM

TO: MARK GOTTLIEB, Chief, Homicide Unit

FROM: ANDREA G. FOULKES, Assistant District Attorney, Homicide Unit

SUBJECT: *COMMONWEALTH V. TERRANCE WILLIAMS*, CP #84-08-2362-2367

In the event the jury in the above-referenced case currently on trial, returns a verdict of Murder I, I request that we actively seek the death penalty.

In the instant case, the defendant, along with a co-defendant Marc Draper who is testifying for the Commonwealth in exchange for a plea to Murder II, Robbery & Conspiracy, abducted Amos Norwood, 56 years, chemist and resident of Mt. Airy, to the Ivy Hill Cemetery on the pretext of obtaining a ride home. There they forced him into the cemetery, tied him with his clothes, robbed him of money, credit cards, keys, etc. and Williams went back to the car to obtain a tire iron and a socket wrench. Upon his return to the bound and denuded victim he and Marc Draper proceeded to beat Amos Norwood about the head numerous times until he was dead. After taking Marc

Draper to work in Norwood's car, defendant returned with gasoline and burned the body, hidden between the gravestones to avoid its identification. Defendant obtained over $200 and purchased gold necklaces with Norwood's credit card. Thus, the first aggravating circumstance is that the case is a felony-murder which rises to Murder in the First Degree.

The defendant has been previously convicted of two serious felonies involving violence to another person:

1. In December, 1982, defendant and one Lucius Larke burglarized the residence of Don and Hilda Dorfman, both in their late 60's, in Mt. Airy, put a .22 caliber rifle to Mrs. Dorfman's head and demanded money as the terrified couple remained in bed. They ransacked the house, taking thousands of dollars worth of property. Defendant was convicted by Judge Michael Wallace and sentenced to 12 ½ to 25 years in prison.

2. In January, 1984, defendant was invited into the residence of Herbert Hamilton, age 50, in West Philadelphia. The victim was homosexual and Williams proceeded to get into bed with the victim concealing a knife. As Williams tried to stab Hamilton a fight ensued and Williams knocked out Hamilton with a baseball bat and then stabbed him numerous times in the back and left the knife lodged in his neck. Kerosene and numerous spent matches were found around the body but no fire was actually

started. Defendant took some property from the deceased's apartment after the killing. Defendant was found guilty by a jury of Murder III and PIC and Theft and sentenced by Judge Sabo to 13 ½ to 27 years consecutive to any other sentence.

The defendant is currently awaiting trial on the robbery Mr. Robert Hill, a friend of Herbert Hamilton. Marc Draper is his co-defendant in that case as well.

In mitigation, defendant is 19 years old and went through one year of college at Cheney University. At Germantown High School, he was reputed to be a promising quarterback and his team won the City championship. He has been described by persons who know him as a Jeckyl-Hyde personality.

Please advise.

[Handwritten Notes of Mark Gottlieb and Ronald D. Castille]

Ron,

I recommend seeking death.

M. Gottlieb 1/22/86

Mark,

Approved to proceed on the death penalty.

Ronald D. Castille